No. 89-1904

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RAFAEL HERNANDEZ COLON, individually and as Governor of the Commonwealth of Puerto Rico; Mercedes Otero de Ramos, individually and as Administrator of the Corrections Administration of the Commonwealth of Puerto Rico; and Lorenzo Villalba, Juanita Gómez, Julio Acevedo Ascencio, individually and as members of the Parole Board of the Commonwealth of Puerto Rico,

Petitioners,

v.

CARLOS MORALES FELICIANO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether interim awards of attorney fees under §1988 are immediately appealable under the collateral order doctrine, particularly in cases of protracted institutional reform litigation with no foreseeable finality.

2. Whether a writ of prohibition should issue to review a jurisdictional issue of constitutional rank left open in *Jenkins*; namely, whether *Jenkins* authorizes a district court to award compounded interest otherwise barred by the Eleventh Amendment as compensation for delay in payment of attorney fees under §1988.

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No. 89- ___

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Petitioners,

v.

CARLOS MORALES FELICIANO, *et. al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Rafael Hernández Colón, Governor of Commonwealth of Puerto Rico, Mercedes Otero de Ramos, Administrator for the Administration of Corrections ("AOC"), and the current members of the Parole Board of the Commonwealth of Puerto Rico, respectfully pray that a writ of certiorari issue to review the two orders of the United States Court of Appeals for the First Circuit entered in the above entitled proceeding on January 5, 1990.

OPINIONS BELOW

The two orders of the Court of Appeals for the First Circuit are: (a) the order of the court entered in *Carlos Morales Feliciano, et al. v. Rafael Hernández Colón*, No. 89-1997, Slip op. (1st Cir. January 5, 1990); and (b) the order of the Court entered in *In re Rafael Hernández Colón*, No. 89-2056, slip op. (1st

Cir. January 5, 1990). Said unreported orders appear as Appendixes A and B. The underlying opinions of the district court and a prior related order of the First Circuit appear as Appendixes C, D and E.

JURISDICTION

The orders of the Court of Appeals were entered on January 5, 1990. Through order of March 27, 1990, Justice Brennan extended the time for filing the petition to and including June 4, 1990. This Court has jurisdiction to review the orders of the Court of Appeals for the First Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1651(a). Writs

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the Untied States Court of Appeals for the Federal Circuit shall

be limited to the jurisdiction described in sections 1291(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This application for a writ of certiorari originates in an opinion and order of September 20, 1988, issued by the District Court for the District of Puerto Rico in *Morales Feliciano v. Hernández Colón*, 697 F.Supp. 51 (D.P.R. 1988), awarding interim attorney fees under 42 U.S.C. §1988 to five of plaintiffs' counsel for services rendered from 1979 to 1987. Appendix D. At the time, the district court denied plaintiffs' request for compensation for delay, based on *Rogers v. Okin*, 821 F.2d 22 (1st Cir. 1987), which held that the Eleventh Amendment barred compensation for delay pursuant to an award of attorney fees. Both parties appealed. On May 10, 1989, the First Circuit dismissed said appeals for lack of jurisdiction. Appendix E. The Court held that an interim award of attorney fees was not a final order appealable under 28 U.S.C. §1291 nor fell within the collateral order exception of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Subsequently, however, the Supreme Court held in *Missouri v. Jenkins By Agyei*, ___U.S. ___, 109 S.Ct. 2463 (1989) that the Eleventh Amendment did not bar an adjustment for delay in payment pursuant to an award of attorney fees under §1988. On September 13, 1989, the district court issued a second award of interim attorney fees and, relying on *Jenkins*, contemporaneously amended *nunc pro tunc* its prior interim award of attorney fees of September 20, 1988 to reflect an enhancement for delay "calculated by compounding the amount of each yearly loadstar fig-

ure at the interest rate which was prevailing at the end of each corresponding year." Appendix D. Said compounded interest was calculated on the basis of the historical year-end prime interest rate.

In its original order of September 20, 1988, the Court awarded $722,275 in attorney fees on the basis of the lodestar plus an enhancement of 30% which raised the total attorney fees award to $934,897.95. As a result of the award of compounded interest, the original award dramatically increased by $2,086,796.42, for a total award of $3,021,405.37.

Simultaneously, with respect to the second fee application covering services rendered from December 1987 to July 1989, the district court awarded a lodestar fee of $251,305.00 plus an enhancement of $72,920.00, for a total award of $324,225.00. This enhancement was predicated on the following factors: (a) the undesirability of the case; (b) its public importance; and (c) the preclusion of more renumerative employment.

As a result, petitioners filed both a petition for a writ of prohibition and a new appeal. In the petition for the writ of prohibition, petitioners asserted that *Jenkins* left open the important question of whether the allowance of compensation for delay could include the imposition of compounded interests otherwise barred by the Eleventh Amendment. Mandamus was appropriate because this issue presented a novel and important jurisdictional question of constitutional rank subject to repetition before effective review.

In the appeal, petitioners presented the *Jenkins* issue, and three additional questions of statutory exegesis under §1988: whether §1988 allowed for an

enhancement on the three factors relied upon by the district court; whether the lodestar adopted reflected the prevailing community rates; and whether counsel should be compensated for work on a unsuccessful appeal. The use of the enhancement and the lodestar adopted by the district court had already been misapplied in the two fee awards to date and was likely of continued misapplication in future fee awards.

In response to an order to show cause why the second appeal should not be dismissed, petitioners distinguished the dismissal of the appeal of the first fee award on two grounds. First, the award of compounded interest pursuant to *Jenkins* implicated jurisdictional and constitutional concerns absent from the first appeal. Second, the intervening First Circuit decision in the same underlying litigation, *Morales Feliciano v. Parole Board of the Commonwealth of Puerto Rico*, 887 F.2d 1 (1st Cir. 1989), *cert. denied by Hernández Colón v. Morales Feliciano*, 110 S.Ct. 1511 (1990), adroitly acknowledged the distinctive characteristic of this protracted institutional reform litigation warranting interlocutory review. There, the court of appeals recognized that the case was a decade-old litigation with no end in sight: "Although the district court has not entered a judgment called 'final,' its injunction and later decrees are functionally equivalent to a final determination of the legal merits, for the parties no longer dispute their legal validity and the district court seems unlikely to make any further 'final' determination of the merits in the near future." *Parole Board*, 887 F.2d at 4. Thus, petitioners contended, the second award of fees and compounded interest was functionally equivalent to the continuing post-judgment monitoring attorney fees

over which the First Circuit exercised jurisdiction in *Brewster v. Dukakis*, 786 F.2d 16 (1st Cir. 1986).

The Court of Appeals summarily denied the petition for a writ of prohibition in one sentence: "It does not present the extraordinary circumstances necessary to grant such petition." See Appendix B.

On the same date, the First Circuit dismissed petitioners' appeal because it did not fall within the purview of *Cohen*'s collateral order doctrine. In its order of January 5, 1990, the Court assumed, *arguendo*, that the separability, finality and importance criteria of *Cohen* were present. It dismissed the appeal, however, because "it fails, as it did before, on the ground that no irreparable injury would occur if immediate review were withheld." Appendix A.

This petition for a writ of certiorari ensued.

REASONS FOR GRANTING THE WRIT

I. By reformulating the collateral order doctrine as requiring a showing of irreparable harm equivalent to a right incapable of vindication on appeal, the First Circuits departs from this Court's precedents and conflicts with other Court of Appeals

The First Circuit's dismissal of petitioners' appeal under the collateral order doctrine significantly departs from *Cohen*'s legacy by requiring a showing of irreparable harm that the court equates with a right incapable of vindication on appeal. This reformulation of the *Cohen* test practically extinguishes the collateral order doctrine from those situations were it is the most warranted: in cases of protracted institutional reform litigation where final judgment is not foreseeable.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court recognized a subset of decisions that are appealable under 28 U.S.C. §1291 even though they do not terminate the underlying litigation. Since *Cohen*, this Court has had occasion to revise and refine the collateral order exception to the final judgement rule. *See Coopers and Lybrand v. Liversay*, 437 U.S. 463 (1978); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Moses Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1 (1983); *Richardson Merrell Inv. v. Koller*, 472 U.S. 424 (1985); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, ___U.S. ___, 108 S.Ct. 1133 (1988). In these cases, the Court has articulated a three-pronged test to determine whether an order that does not finally resolve a litigation is nonetheless appealable under §1291: (a) first, the order must "conclusively determine the disputed question"; (b) second, the order must "resolve an important issue completely separate from the merits of the action"; and (c) finally, the order must be "effectively unreviewable on appeal from a final judgment." *Coopers*, 437 U.S. at 468. Each of these prongs is a necessary condition that must be met.

In its decision of January 5, 1990 in No. 89-1997, the First Circuit dismissed petitioner's appeal because "it fails, as it did before, on the ground that no irreparable injury would occur if immediate review were withheld." Apx. at 2a. Revealingly, the First Circuit identified irreparable injury as the "core concern of the *Cohen* exception" and cited *Appeal of Licht & Semanoff*, 796 F.2d 564, 571 (1st Cir. 1986) for the proposition that irreparable injury requires a "right incapable of vindication of appeal." *Id.* In its

prior order of May 10, 1989, the Court dismissed the appeal because "[o]ther than the speculative claims that the fees, once paid, may not be recoverable, the appellants making the claim of irreparable harm have failed to show that delaying appellate review of the fee award will destroy the legal and practical value of an appeal or that it will make an effective review impossible."

The Fifth, Seventh and Ninth Circuits have coincided with the First Circuit in finding that an award of interim attorney fees falls short of the collateral order exception due to the availability of relief at the end-of-the-case appeal. An exemplary case is *Shipes v. Trinity Industries,* 883 F.2d 339 (5th Cir. 1989), where the Fifth Circuit examined the appealability of an interim fee award under 42 U.S.C. sec. 2000e-5(k) granted by the district court in a Title VII employment discrimination suit. With respect to the first factor, the court noted that *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 452 (1982), which held that a post-judgment motion for attorney's fees under §1988 is uniquely separable from the cause of action to be proved at trial, suggested that interim fees are separable from the merits. The court, however, was hesitant to find the second *Cohen* factor present because an appeal on the merits was still pending, and the possibility of reversal could revoke plaintiffs' standing as prevailing parties. *Shipes*, 883 F.2d 339 (5th Cir. 1989). In the instant petition, said concern is absent because petitioners have *conceded* plaintiffs' status as prevailing party for the limited purpose of the interim attorney fees, in light of *Texas State Teachers Ass'n v. Garland Independent School District*, ___ U.S. ___, 109 S.Ct. 1486 (1989)

("a prevailing party is one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of litigation."). As with the First Circuit, the court stressed the availability of post-judgment review, since defendants could "recover [the interim attorney fees] should the judgment be reversed at some later point." *Shipes*, 883 F.2d at 345. *See Ruiz v. Estelle*, 609 F.2d 118 (5th Cir. 1980); *Dardar v. LaFourche Realty Co., Inc.*, 849 F.2d 955 (5th Cir. 1988).

Likewise, in *Lac Courte Oreilles Indians v. State of Wisconsin*, 829 F.2d 601 (7th Cir. 1987), an Indian rights claim under §1983, the Seventh Circuit found the *Cohen* exception unavailing to review an interim award of attorney fees where appellants failed to show irreparable harm if the appeal is postponed at the end of litigation.

A similar result was reached in *Rosenfeld v. U.S.*, 859 F.2d 717 (9th Cir. 1988), where the Ninth Circuit held that an interim fee award under FOIA was not appealable under the collateral order doctrine because the government could recoup any erroneously awarded interim fees upon appeal of the district court's final disposition of the litigation. *Rosenfeld*, 859 F.2d at 721. *See Hillery, Jr. v. Rushen*, 702 F.2d 848 (9th Cir. 1983)(deciding without discussing that interim award of attorneys fees under §1988 was not appealable collateral order).

The problem with this line of "recoupment theory" cases is that by insisting that the right asserted must be incapable of vindication on an appeal following a final judgment, they overstate the third prong of the collateral order doctrine—effectively unreviewable on appeal from a final judgment—beyond any functional

utility in institutional reform cases.[1] While traditional cases do not enjoy perpetual existence, the new breed of institutional reform litigation in areas such as racial segregation and prison conditions frequently are of unaugurable duration. In civil rights cases concerning "relief of an injunctive nature that must prove its efficacy only over a period of time . . . many final orders may issue in the course of litigation" which may not rise to the stature of a final judgment. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 722-23 (1974).

The "effectively unreviewable" requirement of *Cohen*'s third prong is significantly more supple than the First Circuit's restrictive paraphrase of a "right incapable of vindication on appeal." The latter is a mechanistic formula incapable of vindicating the legitimate interests that may arise in the course of the dynamic, ongoing judicial intervention that characterizes institutional reform litigation. It is scaffolded on the premise that in traditional litigation a final judgment is a reasonable expectation. This premise, however, is frequently absent from protracted institutional reform litigation such as the one in which petitioners are involved. The underlying case is eleven-years old and even the First Circuit was forced to acknowledged that the district court was "unlikely to make any further 'final' determination of the merits in the near future." *Parole Board*, 887 F.2d at 4.

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[1] The premise of these cases, that the statutory fees goes to the attorney who is more likely than his client to conserve the assets for eventual restitution, is erroneous as a matter of law. Under §1988, the fees belong to the party and not the attorney. *Evans v. Jeff D.*, 475 U.S. 717, 730 n.19 (1986); *Brown v. General Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983).

This circumstance renders petitioners appeal "effectively unreviewable" almost by definition. At the very least, in order to determine whether an order is "effectively unreviewable," it is necessary to go beyond the First Circuit's wooden test. *Cohen* requires a perceptive probe of the nature of the underlying litigation, the magnitude of the interests at stake, and the need for regulatory intervention.

In contrast to the First Circuit, the Sixth Circuit has articulated a more balanced approach for measuring *Cohen*'s third prong. *Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988) concerns a class action by inmates against state and prison officials claiming an Eighth Amendment violation by exposure to high levels of asbestos. There, the district court granted a preliminary injunction, appointed experts to oversee compliance and ordered interim attorney fees to plaintiffs' counsel. The Sixth Circuit, recognizing the particular attributes of institutional reform litigation, adopted a less formalistic standard that focused on the practical and functional examination of the underlying litigation:

> The Supreme Court recently has emphasized that appellate jurisdiction to review interlocutory orders in this era of "modern litigation" when some lawsuits are tried in stages over extended periods centers on the related questions of whether "such review is truly needed" and whether the orders in question have serious and perhaps irreparable consequences.

846 F.2d at 1035. (citations omitted).

Using this standard, it found that the interim award of attorney fees constituted both a collateral order under 28 U.S.C. §1291 and the "practical" equivalent of an injunction reviewable under 28 U.S.C. §1292(a)(1). *Id.*

In *Seigal v. Merrick*, 619 F.2d 160 (2d. Cir. 1980), the Second Circuit held that an interim award of attorney fees fell under the collateral order doctrine. It relied on *Trustees v. Greenough*, 105 U.S. 527 (1882), which permitted an appeal from an order awarding fees because it was "collateral" in nature, "having a distinct and independent character." *Seigal*, 619 F.2d at 164 n.7. The Court noted that *Greenough* was a precursor of the *Cohen* collateral order doctrine.

In sum, the First Circuit's denial of petitioners' appeal transmutes *Cohen*'s third prong into a mechanistic prescription impervious to the realities of institutional reform litigation. Its definition of the collateral order doctrine conflicts with a Sixth Circuit standard receptive to needs of modern civil rights litigation. In petitioners case, two interim fee awards totailing over $3 million have already been awarded and respondents have recently requested interim fee awards every three months. There is a real need to review the district court's award of interim fees in this case. Common sense dictates recognition of a fundamental error when a court places an award of compounded interests on top of an award of an enhancement on top of a lodestar, and a core fee of $973,580.00 explodes into a total award of $3,345,625. Petitioners contend the the award of compounded interest is barred by the Eleventh Amendment and the computation of the interim attorney is contrary to §1988. Timely appellate review is necessary to clarify

said issues for future awards. Lower courts need guidance as to the applicability of the *Cohen* collateral order doctrine to awards of interim attorney fees in cases of institutional reform litigation.

II. The First Circuit's denial of the petition for a writ of prohibition disregards the function of the writ in resolving jurisdictional issues of a constitutional rank that arise in protracted institutional reform litigation and is in conflict with other Court of Appeals

The First Circuit's conclusory one-sentence denial of petitioners' petition for a writ of prohibition does ill service to the functional and legal objectives that inform the writ. It directly conflicts with the historical parameters established by this Court for invoking the writ in order "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise authority when it is its duty to do so," *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943), or to prevent a judicial "usurpation of power." *De Beers Consolidated Miners v. United States*, 325 U.S. 212, 217 (1945).

The writ, furthermore, has been also employed to impart advisory guidance and effect supervisory control of lower court operations in those extraordinary circumstances were the magnitude, novelty and recurrence of the claim of error would defeat end-of-the-case review. *La Buy v. Howes Leather Co.*, 352 U.S.249 (1957); *Schlangenhauf v. Holder*, 379 U.S. 104 (1964). *See, generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 613-619 (1973) (henceforth *Note*). The supervisory mandamus uses the writ to effect supervisory control

by the court of appeals over the district court to further "the proper judicial administration of the federal system." *La Buy*, 352 U.S. at 258. It is appropriate to review important issue "likely of significant repetition prior to effective review." *National Right to Work Legal Defense and Educational Fondation v. Richey*, 510 F.2d 1239, 1244, *cert. denied*, 422 U.S. 1008 (1975). The advisory mandamus, on the other hand, uses the writ to determine "basic, undecided issues . . . of first impression . . . that presents new and important problems." *Schlangenhauf*, 379 U.S. at 110-111.

The recognition of the advisory mandamus corresponds to the development of jurisprudence away from a focus on formal labels of jurisdictional error or ministerial duty toward an examination of the practical nature of the claim of error warranting immediate judicial review of non-final orders because the normal end-of-case appeal would be either "ineffectual or leave legitimate interest unduly at risk." *United States v. Lasher*, 481 F.2d 229, 235 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974). In particular, mandamus has been exercised in situations "where the interpretation of the controlling statute is in doubt . . . [and] the statute, once interpreted creates a peremptory obligation for the [court] to act." *United States v. Palmer*, 871 F.2d 1202, 1209 (3d Cir. 1989); *13th Regional Corp. v. U.S. Department of Interior*, 654 F.2d 758 (D.C. Cir. 1980); *United States v. Jackson*, 550 F.2d 830, 831 (2d Cir. 1977).

The issue of whether the Eleventh Amendment still bars the award of compounded interest after *Jenkins*, is parallel to the issue in *Schlangenhauf*, over which the Supreme Court confirmed the issuance of a man-

damus. There, the petitioner sought a writ of prohibition with respect to the district court's power to order a mental and physical examination of defendant pursuant to the recently enacted Fed. R. Civ. P. 35. Acknowledging that a writ is not to be used as a substitute for an appeal, the court nonetheless found its use appropriate to resolve the basic, undecided question of the district court's power to order an examination. According to the Court: "that this issue is substantial is underscored by the fact that the challenged order requiring examination of a defendant appears to be the first of its kind in any reported decision in the federal courts under Rule 35, and we have found only one such modern case in the state courts." *Schlangenhauf*, 379 U.S. at 111.

The First Circuit's opinion directly conflicts with the Ninth Circuit's decision in *Rosenfeld v. U.S.*, 859 F.2d 717 (9th Cir. 1988). There, the Ninth Circuit examined whether the district court's award of interim attorney fees under the Freedom of Information Act violated the United States' claim of sovereign immunity. *Rosenfeld*, 859 F.2d at 723. The federal government had presented both an appeal and a petition for a writ of mandamus. The Ninth Circuit asserted that orders which exceed limitations on waivers of sovereign immunity were extra-jurisdictional. Although it found that the appeal did not fall within *Cohen*'s collateral order doctrine, it held that "jurisdictional issues raised in the government's appeal make mandamus review especially appropriate." *Id.*

The First Circuit's order in this case is antithetical to this Court's precedents and in conflict with the Ninth Circuit. Like in *Rosenfeld*, petitioners assert that *Jenkins* allowance for compensation for delay is

not a waiver of the Commonwealth's Eleventh Amendment immunity against interest grounded in *Library of Congress v. Shaw*, 478 U.S. 310 (1986). The district court's reticent opinion does not explain how it arrived at the conclusion that *Jenkins'* endorsement of the delay enhancement was equivalent to the imposition of compounded interest. Admittedly, *Jenkins* endorses the language in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 716 (1987), which provides: "In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates, or by adjusting the fees based on historical rates to reflect its present value." *Jenkins*, however, does not make a single reference to interest as a measure of compensation for delay. There, the Court was reviewing an enhancement for delay consisting of an award of attorney fees based on current, rather than historic, market rates. Interest was not an issue.

The reference in *Jenkins* of adjusting the historical fee to "reflect its present value" is no authority for the imposition of compounded interest as a measure of compensation for delay. In neither of the two supporting cases cited in *Jenkins* was interest awarded as compensation for delay. *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985) (awarding current rates); *Louisville Black Police Officers Organization, Inc. v. Louisville*, 700 F.2d 268 (6th Cir. 1983) (33% enhancement). On the contrary, there is authority for the proposition that the concession of interest as compensation for delay creates a "windfall" for attorneys antagonistic to the congressional intent of §1988. *Lightfoot v. Walker*, 826 F.2d 516, 523 (7th Cir. 1987) (favoring current rates over an award of interest since

the latter creates a windfall for attorneys). Thus, in addition to the Eleventh Amendment bar, the award of compounded interest may be proscribed by §1988 itself.

The First Circuit's failure to grant the writ of prohibition in this case is unexplainable and unexplained. As in *Rosenfeld*, a legitimate jurisdictional questional of constitutional rank is present. This question, as in *Schlangenhauf*, is an important issue of first impression, nascent from this Court's recent opinion in *Jenkins*. As acknowledged by the First Circuit, this is protracted institutional reform litigation with no foreseeable final judgment allowing an effective appeal. The denial of the writ under these circumstances entails the surrender of the Commonwealth's legitimate Eleventh Amendment interests. Plenary consideration of this matter is essential.

CONCLUSION

For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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June 4, 1990

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 89-1997

CAROLS MORALES FELICIANO, *ET AL.*,
Plaintiffs, Appellees,

v.

RAFAEL HERNANDEZ COLON, *ET AL.*,
Defendants, Appellants.

Before

Breyer, Torruella and Selya,
Circuit Judges.

ORDER OF COURT

Entered January 5, 1990

The Commonwealth appeals from an interim award of attorneys' fees made under 42 U.S.C. § 1988. The first such award was made on September 20, 1988. In the order disposing of its appeal from that first order, entered in May, 1989, we found that the appeal was interlocutory and did not fit under the collateral order exception endorsed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The second award of fees was entered on September 13, 1989. In the appeal of this award, we see no reason to depart from our earlier ruling. Appellants point to two intervening events that, they claim, make this appeal collateral under *Cohen*. First is the recent Supreme Court

decision in *Jenkins* v. *Missouri*, 109 S.Ct. 2463 (1989), which decided, contrary to the law in this circuit, that an enhancement in attorneys' fee awards for delays was not barred by the eleventh amendment. Appellants claim that this holding concerns an important and unsettled question of controlling law. Thus, appellants argue, this appeal fits within the borders of the *Cohen* collateral order exception. In this context, we note the presence of 28 U.S.C. § 1292(b) which deals with just these kinds of questions. Appellants also claim that the award of fees is separable from the merits and is final.

Even assuming that this appeal meets three of *Cohen*'s four criteria, it fails, as it did before, on the ground that no irreparable injury would occur if immediate review were withheld. This factor is the core concern of the *Cohen* exception. *In re Licht & Semanoff*, 796 F.2d 564, 571 (1st Cir. 1986) (to satisfy third factor there must be a right incapable of vindication on appeal). Indeed, appellants do not even raise this issue in their opposition to the motion to dismiss the appeal.

Second, appellants rely upon a recent decision of this court, in this same action, finding an order increasing fines pursuant to a contempt order appealable under *Cohen*. *See Morales* v. *Parole Board*, 887 F.2d 1 (1st Cir. 1989). There we found that, if forced to wait until a "final" judgment issues, the Commonwealth might be irreparably damaged given the large sums of money involved. Here, again, no one is arguing that a delay in appeal would result in a risk that the government would be denied justice.

We therefore grant appellees' motion to dismiss the appeal.

By the Court:

/s/ Francis P. Scigliano

Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-2056

IN RE: RAFAEL HERNANDEZ COLON,
Petitioner.

Before

Breyer, Torruella and Selya,
Circuit Judges.

ORDER OF COURT

Entered January 5, 1990

We dismiss the motion to consolidate the petition for a writ of prohibition with the appeal in 89-1997, as we have dismissed the appeal. As for the petition for a writ of prohibition, we deny it. It does not present the extraordinary circumstances necessary to grant such petition. *See In re Recticel Foam Corp.*, 859 F.2d 1000, 1005 (1988).

By the Court:

Clerk.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 79-4(PG)

CARLOS MORALES FELICIANO, *et al.*,
Plaintiffs,

v.

RAFAEL HERNANDEZ COLON, *et al.*,
Defendants.

FILED
SEP 13 1989

OPINION AND ORDER

Before us are two separate matters pertaining to applications for interim attorney's fees submitted by counsel for plaintiffs herein. First, the attorneys have submitted a motion requesting reconsideration of our fee award of September 20, 1988, *see Morales Feliciano v. Hernández Colón*, 697 F.Supp. 51 (D.P.R. 1988), to conform the same to recently decided Supreme Court precedent. Second, the attorneys have submitted applications for further interim fees, corresponding to the hours devoted by them to the above-captioned cause from December 1, 1987, until July 31, 1989. We address these matters *seriatim*.

I

In making our September 20, 1988 attorney's fee award we felt bound by our Circuit's decision in *Rogers v. Okin*,

821 F.2d 22 (1st Cir. 1987) (holding that Eleventh Amendment prohibits award of attorneys' fees against state that includes interest and delay of payment factors unless state expressly waives Eleventh Amendment immunity). Hence, we disallowed the attorneys' request that they be paid current rates for their work in light of the nearly nine years of inflation since the case was commenced and the lost interest income that could have been generated had the fees been paid when their services were provided. Instead, we did what the *Rogers* court had done: we used the attorneys' historical rates as a point of reference in determining a reasonable fee.

The U.S. Supreme Court's recent decision in *Missouri v. Jenkins*, No. 88-64 (June 19, 1989), however, mandates reconsideration of this conclusion, for the Court's holding in that case implicitly overrules *Rogers*. After reaffirming its holding in *Hutto v. Finney*, 437 U.S. 678 (1978) (Eleventh Amendment does not apply to award of attorney's fees against state ancillary to grant of prospective relief), the Court in *Jenkins* went on to state:

> It follows that the same is true for the calculation of the *amount* of the fee. An adjustment for delay in payment is, we hold, an appropriate factor in the determination of what constitutes a reasonable attorney's fee under § 1988. An award against a State of a fee that includes such an enhancement for delay is not, therefore, barred by the Eleventh Amendment.

Slip Op. at 9. The Court's holding in *Jenkins* thus makes clear that our September 20, 1988, award of interim fees could have properly included an enhancement for delay of payment. Our order is therefore hereby AMENDED *nunc pro tunc* to reflect such an enhancement, calculated by compounding the amount of each yearly "lodestar" figure

at the interest rate which prevailed at the end of each corresponding year, which yields the following awards:[1]

Mr. Nachman:	$1,413,345.31
Mr. Pérez Bachs:	$ 166,647.48
Mr. Anduze:	368,781.49
Mr. Fernández Sein:	966,846.23
Mr. Ramos:	106,153.86

II

We turn next to the application for further interim fees submitted by plaintiffs' counsel. Plaintiffs have been ably represented by attorneys Harvey Nachman, José Fernández Sein, Rafael Pérez Bachs, Harry Anduze, Carlos Ramos, Carlos García Gutierrez, Nora Rodriguez Matias and Ivonne Díaz de Carreras. All except Mr. García Gutierrez and Ms. Rodriguez Matias have submitted records of the hours devoted by each to this case between December 1, 1987, and July 31, 1989.[2]

Pursuant to 42 U.S.C. § 1988, we may allow the prevailing party in a suit brought under 42 U.S.C. § 1983 "a reasonable attorney's fee as part of the costs." We have already declared plaintiffs to have been prevailing parties with respect to the instant litigation *See Morales Feliciano, supra*, 697 F.Supp. at 56.

In order to calculate a reasonable attorney's fee a two-step process must be followed. *Henseley v. Eckerhart*, 461 U.S. 424, 433-434 (1983). First, the hours reasonable expended by each prevailing attorney must be multiplied by a reasonable hourly rate in order to arrive at a "lodestar" figure, which is "presumed to be the reasonable fee to which counsel is entitled." *Pennsylvania v. Delaware Val-*

[1] See Appendix A for a yearly breakdown of the calculations.

[2] Mr. García Gutierrez has settled the amount of his fees with defendants. Ms. Rodriguez Matias, currently president of the "Colegio de Abogados", refues to accept compensation for legal services performed *pro bono publico* while she serves in such capacity.

ley Citizen's Council for Clean Air, 478 U.S. 546, 564 (1986) (Delaware Valley I) (quoting *Blum v. Stetson*, 465 U.S. 886, 897 (1984)). Second, the Court may, in exceptional cases, make upward adjustments to the lodestar figure to reflect various factors which it does not account for, such as risk of nonpayment, delay in payment, and undesirability or importance of the case. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987) (Delaware Valley II).

To determine the number of hours reasonably expended on a case, we must take the "hours actually spent and then subtract from that figure hours which were duplicative, unproductive, excessive or otherwise unnecessary." *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984). After careful scrutiny of the monthly time records submitted by counsel pursuant to our August 19, 1988 order, we find that for the most part the hours claimed by the attorneys have been reasonably expended, and are not "duplicative, unproductive, excessive or otherwise unnecessary."[3]

As to the reasonable compensation for each hour worked, it must be based upon an analysis of the prevailing local rates and the attorneys' "skill, experience and reputation." *Grendel's Den, supra*, at 955 (citing *Blum v. Stetson*, 465 U.S. 886, 895 n. 11 (1984)). Having already heard testimony on this point from the attorneys representing plaintiffs, *see Morales Feliciano, supra* at 55-57, we are suitably familiarized with the hourly rates awarded them in the past. We have also received evidence documenting the most current prevailing hourly rates charged by local attorneys for legal services involving federal litigation.[4]

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[3] We found only one instance of duplication, to wit: Mr. Nachman's application inadvertently twice billed 10 hours for court appearances on August 15, 1988. Naturally, we counted this entry but once.

[4] See e.g., Plaintiffs' Exhibit 1, "Survey of Hourly Rates for Legal

In accordance with the holding of *Jenkins*, we base our award on the attorneys' current rates in order to account for any delay in payment. After examining the evidence submitted by counsel, we hereby find their current hourly rates to be the following:

Mr. Nachman: $200/hr.; Mr. Pérez Bachs: $180/hr.; Mr. Anduze: $160/hr.; Mr. Fernández Sein: $160/hr.; Mr. Ramos: $130/hr.; Ms. Diaz de Carreras: $100/hr.

The rate-fixing task does not end, however, with the determination of the attorneys' current hourly rates. Following the practice approved by our Court of Appeals and the U.S. Supreme Court, we must also assign different rates to the different tasks performed by the attorneys. *See Delaware Valley I, Supra* at 567; *United States of America v. Metropolitan District Commission*, 847 F.2d 12, 19 (1st Cir. 1988); *Jacobs v. Mancuso*, 825 F.2d 559, 561 n. 3 (1st Cir. 1987); *Miles v. Sampson*, 675 F.2d 5, 9 (1st Cir. 1982); *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

As in our previous award, we distinguish between three basic categories of tasks performed by plaintiffs' attorneys. *See Morales Feliciano, supra* at 59. The attorneys shall be awarded the full hourly rate, or a fraction thereof, for each task performed, depending on which category it falls in. The categories are:

> 1. Low: includes notifications and visits to the penal institutions; prisoners interviews; conferences with co-counsel or adversaries (unless otherwise categorized); drafting of letters; drafting and reading of intra-counsel memoranda; proofreading and copyreading; notification of and

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Services Involving Federal Litigation", prepared by Donald J. Kevane, C.P.A., and submitted into evidence at the hearing held August 18th 1989.

preparation for depositions; review of documents; telephone conversations; and travel time.

2. Medium: includes general research; taking of and attendance at depositions; preparation for court hearings or conferences (if so specified on the time records); preparation of subpoenas, class notices, interrogatories and answers thereto, prisioners' questionnaires, and affidavits; unspecified meetings with monitors; preparation for prisioners, rights seminars; and preparation for fee applications.

3. High: includes court appearances and in-chambers conferences; appearances before the legislature or administrative agencies; jail visits with the judge; preparation and drafting or dictation of motions and briefs; stipulation negotiations with court monitors and/or defendants.

As done previously, hours falling into the low, medium and high categories shall be compensated at 60%, 80% and 100% of the applicable rate, respectively.

Implementation of the above-mentioned guidelines yields the following "lodestars":[5]

Mr. Nachman:	$74,210.00
Mr. Pérez Bachs:	44,091.00
Mr. Anduze:	44,096.00
Mr. Fernández Sein:	52,608.00
Mr. Ramos:	24,700.00
Mr. Diaz de Carreras	11,600.00

As previously stated in our Opinion and Order of September 20, 1988, we believe the instant litigation to be one of those exceptional cases in which it is appropriate to upwardly adjust the lodestar figures based on three factors: (a) The undesirability of the case, (b) its enormous

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[5] See Appendix B for a breakdown per category for each applicant.

public importance, and (c) the fact of plaintiffs' counsel's foregoing more remunerative employment in order to accept and prosecute it. *See Morales Feliciano, supra* at 60-61 (explaining appliciability of each factor).

Hence, we shall increase each applicant's lodestar by 10% for each factor applicable to him or her. In other words, the lodestars of Messrs. Nachman, Fernández Seín, Anduze, Pérez Bachs, and of Ms. Diaz de Carreras shall be increased by 30%. Mr. Ramos' lodestar shall be increased by 20%.[6] The awards will therefore be:

Mr. Nachman:	$96,473.00
Mr. Pérez Bachs:	57,318.30
Mr. Anduze:	57,324.80
Mr. Fernández Sein:	68,390.40
Mr. Ramos:	29,640.00
Mr. Diaz de Carreras	15,080.00

IT IS SO ORDERED.

San Juan, Puerto Rico, September 13, 1989.

/s/ Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
/s/ Chief U.S. District Judge

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[6] Mr. Ramos is not affected by the economic factor because he is not in private practice. *See Morales Feliciano, supra* at 61 n. 9.

Appendix A to Opinion Order of the District Court of Puerto Rico, *Morales Feliciano v. Hernández Colón*, Civil No. 79-4 (PG), Slip op., entered on September 13, 1989

This is a breakdown of the computations made in order to amend our September 20, 1988 award of interim fees to include an additional enhancement factor for delay in payment, as permitted by the U. S. Supreme Court's recent decision in *Missouri v. Jenkins*. The following figures are computed by compounding the amount of the original historical "lodestar" at year-end prime interest rates;[1] accruing no interest the first year but accruing full compound interest through December 31, 1989. The final total also takes into account the three award enhancement factors mentioned in our Opinion and Order of September 20, 1988.

MR. NACHMAN

A. 1979

1. Original award: $25,300.00
2. Interest rate at end of 1979: 15.25%
3. Compounded (12/31/89): $90,758.78

B. 1980

1. Original award: $165,255.00
2. Interest rate at end of 1980: 20.5%
3. Compounded (12/31/89): $734,600.00

C. 1981

1. Original award: %51,667.50
2. Interest rate at end of 1981: 15.75%
3. Compounded (12/31/89): $143,834.90

[1] All calculations are made using historical year-end prime interest rates (See Plaintiffs' Exhibit 5, attached to their Motion for Reconsideration of Fee Award).

D. 1982

1. Original award: $11,047.00
2. Interest rate at end of 1982: 11%
3. Compounded (12/31/89): $20,662.45

E. 1983

1. Original award: $1,215.00
2. Interest rate at end of 1983: 11%
3. Compounded (12/31/89): $2,047.33

F. 1984

1. Original award: $11,722.50
2. Interest rate at end of 1984: 10.75%
3. Compounded (12/31/89): $17,635.77

G. 1985

1. Original award: $7,770.00
2. Interest rate at end of 1985: 9.5%
3. Compounded (12/31/89): $10,201.48

H. 1986

1. Original award: $33,285.00
2. Interest rate at end of 1986: 7.5%
3. Compounded (12/31/89): $38,464.97

I. 1987

1. Original award: $26,390.00[2]
2. Interest rate at end of 1987: 8.75%
3. Compounded (12/31/89): $28,699.12

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[2] As amended, *nunc pro tunc*, by order of this Court dated January 10, 1989.

J. TOTAL

1. "Lodestar" including interest: $1,086,904.80
2. Plus 30%[3] award enhancement: $326,071.44
3. Total award: $1,412,976.24

MR. PEREZ BACHS

A. 1976

1. Original award: $875.00
2. Interest rate at end of 1976: 6%
3. Compounded (12/31/89): $1,866.31

B. 1977

1. Original award: $1,352.00
2. Interest rate at end of 1977: 7.75%
3. Compounded (12/31/89): $3,311.19

C. 1978

1. Original award: $3,609.00
2. Interest rate at end of 1978: 11.75%
3. Compounded (12/31/89): $12,249.25

D. 1979

1. Original award: $4,660.00
2. Interest rate at end of 1979: 15.25%
3. Compounded (12/31/89): $19,266.16

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[3] In accordance with our order of September 20, 1988, the "lodestars" of Messrs. Nachman, Pérez Bachs, Anduze and Fernández Sein are increased by 30 percent, and Mr. Ramos' "lodestar" is increased by 20 percent.

E. 1980

1. Original award: $10,026.50
2. Interest rate at end of 1980: 20.5%
3. Compounded (12/31/89): $53,707.23

F. 1981

1. Original award: $9,150.00
2. Interest rate at end of 1981: 15.75%
3. Compounded (12/31/89): $29,484.18

G. 1982

1. Original award: $1,174.50
2. Interest rate at end of 1982: 11%
3. Compounded (12/31/89): $2,438.45

H. 1983

1. Original award: $420.00
2. Interest rate at end of 1983: 11%
3. Compounded (12/31/89): $785.57

I. 1984

1. Original award: $360.00
2. Interest rate at end of 1984: 10.75%
3. Compounded (12/31/89): $599.82

J. 1986

1. Original award: $3,608.00
2. Interest rate at end of 1986: 7.5%
3. Compounded (12/31/89): $4,482.21

K. TOTAL

1. "Lodestar" including interest: $128,190.37
2. Plus 30% award enhancement: $38,457.11
3. Total award: $166,647.48

MR. ANDUZE

A. 1979

1. Original award: $3,036.00
2. Interest rate at end of 1979: 15.25%
3. Compounded (12/31/89): $10,890.97

B. 1980

1. Original award: $44,500.50
2. Interest rate at end of 1980: 20.5%
3. Compounded (12/31/89): $197,815.86

C. 1981

1. Original award: $19,236.00
2. Interest rate at end of 1981: 15.75%
3. Compounded (12/31/89): $53,550.25

D. 1982

1. Original award: $648.00
2. Interest rate at end of 1982: 11%
3. Compounded (12/31/89): $1,212.00

E. 1983

1. Original award: $156.00
2. Interest rate at end of 1983: 11%
3. Compounded (12/31/89): $262.84

F. 1984

1. Original award: $1,579.50
2. Interest rate at end of 1984: 10.75%
3. Compounded (12/31/89): $2,376.24

G. 1985

1. Original award: $4,487.00
2. Interest rate at end of 1985: 9.5%
3. Compounded (12/31/89): $5,891.12

H. 1986

1. Original award: $3,514.00
2. Interest rate at end of 1986: 7.5%
3. Compounded (12/31/89): $4,060.86

I. 1987

1. Original award: $7,005.00
2. Interest rate at end of 1987: 8.75%
3. Compounded (12/31/89): $7,617.93

J. TOTAL

1. "Lodestar" including interest: $283,678.07
2. Plus 30% award enhancement: $85,103.42
3. Total award: $368,781.49

MR. FERNANDEZ SEIN

A. 1979

1. Original award: $22,500.50
2. Interest rate at end of 1979: 15.25%
3. Compounded (12/31/89): $80,713.89

B. 1980

1. Original award: $87,081.50
2. Interest rate at end of 1980: 20.5%
3. Compounded (12/31/89): $452,954.14

C. 1981

1. Original award: $31,380.00
2. Interest rate at end of 1981: 15.75%
3. Compounded (12/31/89): $87,357.42

D. 1982

1. Original award: $8,586.00
2. Interest rate at end of 1982: 11%
3. Compounded (12/31/89): $16,059.35

E. 1983

1. Original award: $21,086.00
2. Interest rate at end of 1983: 11%
3. Compounded (12/31/89): $35,531.12

F. 1984

1. Original award: $10,361.00
2. Interest rate at end of 1984: 10.75%
3. Compounded (12/31/89): $15,728.71

G. 1985

1. Original award: $12,950.00
2. Interest rate at end of 1985: 9.5%
3. Compounded (12/31/89): $17,002.47

H. 1986

1. Original award: $17,339.00
2. Interest rate at end of 1986: 7.5%
3. Compounded (12/31/89): $20,037.37

I. 1987

1. Original award: $16,867.50
2. Interest rate at end of 1987: 8.75%
3. Compounded (12/31/89): $18,343.40

J. TOTAL

1. "Lodestar" including interest: $743,727.87
2. Plus 30% award enhancement: $223,118.36
3. Total award: $966,846.23

Appendix A to Opinion Order of the District Court of Puerto Rico, *Morales Feliciano v. Hernández Colón*, Civil No. 79-4 (PG), Slip op., entered on September 13, 1989

This is a breakdown, by category as defined *supra*, of the annual fees (without multipliers) we are awarding in favor of Messrs. Nachman, Pérez Bachs, Anduze, Fernández Sein, Ramos, and Ms. Diaz de Carreras. The following is a model/description of how the calculations were made:

YEAR X (CURRENT HOURLY RATE)

Low category hours claimed times 60% of current hourly rate = fees awarded for low category hours in year X.

Medium category hours claimed times 80% of current hourly rate = fees awarded for medium category hours in year X.

High category hours claimed times 100% of current hourly rate = fees awarded for high category hours in year X.

Total hours claimed for year X/Lodestar (total fees awarded [without multiplier] for year X).

MR. RAMOS

A. 1981

1. Original award: $24,270.00
2. Interest rate at end of 1981: 15.75%
3. Compounded (12/31/89): $67,564.17

B. 1983

1. Original award: $1,200.00
2. Interest rate at end of 1983: 11%
3. Compounded (12/31/89): $2,022.05

C. 1985

1. Original award: $8,450.00
2. Interest rate at end of 1985: 9.5%
3. Compounded (12/31/89): $11,094.27

D. 1987

1. Original award: $7,155.00
2. Interest rate at end of 1987: 8.75%
3. Compounded (12/31/89): $7,781.06

E. TOTAL

1. "Lodestar" including interest: $88,461.55
2. Plus 20% award enhancement: $17,692.31
3. Total award: $106,153.86

MR. NACHMAN

1987 ($200)

19.25	x $120 =	$2,310.00
18.75	x $160 =	3,000.00
0.50	x $200 =	100.00
38.50		$5,410.00

1988 ($200)

238.25	x $120 =	$28,590.00
46.00	x $160 =	7,360.00
107.25	x $200 =	21,450.00
391.50		$57,400.00

1989 ($200)

47.00	x $120 =	$ 5,640.00
16.00	x $160 =	2,560.00
16.00	x $200 =	3,200.00
79.00		$11,400.00

Total hours = 509 / Lodestar = $74,210.00

MR. PEREZ BACHS

1988 ($180)

31.00 x 108 =		$ 3,348.00
45.00 x 144 =		6,480.00
21.50 x 180 =		3,870.00
97.50		$13,698.00

1989 ($180)

10.50 x 108 =		$ 1,134.00
68.50 x 144 =		9,864.00
107.75 x 180 =		19,395.00
186.75		$30,393.00

Total hours = 284.25 / Lodestar = $44,091.00

MR. ANDUZE

1987 ($160)

6.00 x 96 =		$576.00
0.00 x 128 =		0.00
0.00 x 160 =		0.00
6.00		$576.00

1988 ($160)

110.50 x 96 =		$10,608.00
12.50 x 128 =		1,600.00
126.25 x 160 =		20,200.00
249.25		$32,408.00

1989 ($160)

115.75 x 96 =		$11,112.00
0.00 x 128 =		0.00
0.00 x 160 =		0.00
115.75		$11,112.00

Total hours = 371.00 / Lodestar = $44,096.00

MR. FERNANDEZ SEIN

1987 ($160)

5.25	x 96	=	$ 504.00
12.25	x 128	=	1,568.00
0.00	x 160	=	0.00
17.50			$2,072.00

1988 ($160)

117.00	x 96	=	$11,232.00
64.50	x 128	=	8,256.00
114.00	x 160	=	18,240.00
295.50			$37,728.00

1989 ($160)

95.00	x 96	=	$ 9,120.00
14.75	x 128	=	1,888.00
11.25	x 160	=	1,800.00
121.00			$12,808.00

Total hours = 434.00 / Lodestar = $52,608.00

MR. RAMOS

1988 ($130)

61.00	x 78	=	$ 4,758.00
16.00	x 104	=	1,664.00
64.50	x 130	=	8,385.00
141.50			$14,807.00

1989 ($130)

71.25	x 78	=	$5,557.50
30.75	x 104	=	3,198.00
8.75	x 130	=	1,137.50
110.75			$9,893.00

Total hours = 252.25 / Lodestar = $24,700.00

MS. DIAZ DE CARRERAS

1988 ($100)

39.25	x	60 =	$2,355.00
2.00	x	80 =	160.00
39.00	x	100 =	3,900.00
80.25			$6,415.00

1989 ($100)

47.50	x	60 =	$2,850.00
17.00	x	80 =	1,360.00
9.75	x	100 =	975.00
74.25			$5,185.00

Total hours = 154.50 / Lodestar = $11,600.00

APPENDIX D

United States District Court,
D. Puerto Rico

Civ. No. 79-4(PG).

Carlos MORALES FELICIANO, *et al.*,
Plaintiffs,

v.

Rafael HERNANDEZ COLON, *et al.*,
Defendants.

Sept. 20, 1988.
As Amended Sept. 23, 1988.

OPINION AND ORDER

PEREZ-GIMENEZ, Chief Judge.

Under our consideration are applications for interim attorney's fees submitted by five of plaintiffs' attorneys: Messrs. Harvey Nachman, Rafael Pérez Bachs, Harry Anduze, José Fernández Seín and Carlos Ramos. The applications cover the hours worked until November 30, 1987. Attorneys for plaintiffs and for defendants have exchanged documents as to the hours worked in this case and rates charged in this as well as other cases. A two-day hearing was held in which all applicants testified as witnesses on their own behalf and submitted documentary and expert evidence in support of their applications.[1] Before going into

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[1] At the beginning of the hearing defendants attempted to submit a so-called "hearing aid brief" that we disallowed. At the end of the hearing, they again tried to submit it as a post-hearing brief. We reiterated our rejection convinced that our acceptance would be unfair to plaintiffs' attorneys, who would not have had an opportunity to oppose the brief. Defendants had a chance to present their challenges to the claimed hours and fees during the hearing, where we would have had the benefit of face-to-face confrontation.

the applications' merits, a brief summary of this litigation is a necessary background.

I.

Plaintiffs are all persons incarcerated under the custody of the Administration of Correction of the Commonwealth of Puerto Rico, and the defendants are the Governor of the Commonwealth, the Administrator of Correction, as well as the present and some former members of the Parole Board of the Commonwealth. The action was commenced by a complaint filed on February 7, 1979,[2] and certified as a class action on April 9, 1979. Plaintiffs alleged the conditions of confinement violated their rights under the United States Constitution as well as the laws and Constitution of the Commonwealth.

After more than a year of bitterly contested discovery, plaintiffs filed a motion for a preliminary injunction for emergency, provisional and extraordinary relief to halt the alleged violations. On May 7, 1980, we issued an order to show cause why the requested injunction should not be granted. A month-long hearing on the motion was held. On September 5, 1980, we granted emergency relief as to the most pressing health and custodial maladies within the prison system. *Feliciano v. Barceló*, 497 F.Supp. 14 (D.P.R. 1981). Patent violations to the Eighth Amendment to the U.S. Constitution sufficed as a basis to our order. *Id.* at 18. Thirty-eight days of hearing followed during the November 1980 to March 1987 period. Convinced that the chaotic conditions would take time to mend, we gave defendants some leeway to come up with a major reform plan.

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[2] This action originated as a letter complaint filed on January 2, 1979. After petitioner was allowed to proceed in *forma pauperis* and an attorney was named to represent him, the formal complaint was filed on this date.

During the years between 1981 and 1985 some short-lived efforts were made by defendants to comply partially with the preliminary injunction. To corroborate it, the Court visited most of the penal institutions on the Island. Evidentiary hearings were held. Finding that the constitutional violations continued and, thus, that compliance would not come about voluntarily, the Court had no choice but to appoint monitors on March 21, 1986. *Morales Feliciano v. Romero Barceló*, 672 F.Supp. 591 (D.P.R. 1986). The Court was particularly shocked at the intolerably overcrowded condition of most penal institutions.

The first formal act of the monitors, undertaken with the Court's express approval, was to convene negotiations to address the overcrowding crisis. After several months of gathering information and negotiating as to living space in the different institutions, the parties signed a stipulation on the overcrowding issue. Defendants were to provide 35 feet of living space per inmate by December 31, 1986. They had been ordered to provide that space since 1980. This Court approved the stipulation and transformed it into its order on January 26, 1987.

A month later the monitors filed a report as to defendants' compliance with the stipulation. Defendants had not complied. Plaintiffs moved for contempt and imposition of civil sanctions. Hearings were held. On July 23, 1987, this Court found defendants in contempt of the January order, fined them for $50,000, and imposed a prospective daily fine of $10 for each inmate above stipulated institutional capacity, 697 F.Supp. 26. Defendants moved for relief of their obligation to provide the required living space. The motion was denied. *Morales Feliciano v. Hernández Colón*, 672 F.Supp. 627 (D.P.R. 1987).

Since then defendants have been fined every day for violating the stipulation. During February and March of the current year they were close to fully complying with it. Unfortunately, this effort was short-lived. Defendants

have been paying biweekly fines of over $25,000 since May 13. By July the biweekly fines were of over $80,000. Given this pattern of non-compliance, we decided to increase the fine per inmate held in violation of the stipulation to $50 a day beginning on September 1 and an automatic increase of $10 per inmate for every upcoming month in which defendants fail to comply. Furthermore, we ordered the Ponce District Jail to commence a phase out to be completed by December 31, 1988.

II.

Eight attorneys have represented plaintiffs at some point during this litigation. Two of them have already settled their fees with defendants. Messrs. Nachman, Pérez Bachs, Anduze, Fernández Seín and Ramos await our award.[3]

Mr. Nachman was the first lawyer we tapped to represent plaintiffs. He is their lead counsel, the mastermind behind the whole case. He has been a litigator ever since he graduated from Columbia University School of Law and started practicing in 1950. Mr. Nachman is among the three better plaintiffs' lawyers of our bar. His expertise in civil rights cases is indisputable. In his fee application, Mr. Nachman claims to have worked 2,810 hours and asks us to award each hour worked at $200, his current hourly rate. His rates during the years of this litigation have increased in the following manner: $125 between 1979 and 1980; $150 between 1980 and 1986; $175 between 1986 and 1987; and since January 1, 1988, $200. Most of his work, however, is done on a contingency basis.

Mr. Pérez Bachs became involved in this litigation in 1979, when four cases in which he represented maximum security prisoners were consolidated with the one at hand. He has been litigating since his graduation from the Uni-

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[3] Mrs. Ivonne Santiago submitted her application, belatedly, on September 9, 1988. We will be ruling on it very soon.

versity of Puerto Rico Law School ("U.P.R. Law School") in 1971. He is currently a partner in Puerto Rico's largest law firm, where he works as a corporate litigator. Mr. Pérez Bachs is undoubtedly one of the premiere litigators of his kind. Although he rarely worked or works on civil rights litigation other than this case, at the time of its inception he had been working on prisoners' cases for over two years. That experience made Mr. Pérez Bachs an "expert" on such cases given the only handful of attorneys then accepting prisoners' representation. In his fee application Mr. Pérez Bachs asks us to award him fees for 385.75 hours of work at a rate between $140 and $160 per hour. The bulk of his labored hours occurred during the early years of this litigation, including some worked prior to the consolidation. He has been almost completely inactive in this case since 1982. His hourly rates during the years of this litigation have increased in the following fashion: 1976-$70; 1977-$80; 1978-$90; 1979-$100; 1980-$110; 1981-$125; 1982-$135; 1983-$140; 1984-$150; 1985-$160; 1986-$170; 1987-$170; 1988-$180.

Mr. Anduze was recruited by Mr. Nachman to join the case in 1979. His initial task was to teach a prisoners' rights seminar to Legal Services' ("Legal Services") attorneys along with Messrs. Nachman and Fernández Seín, in exchange for which Legal Services was to pay for the expenses incurred by plaintiffs' attorneys during the early years of this litigation and to provide the help of three of Legal Services' lawyers for this case. Although Mr. Anduze does not have the years of experience Mr. Nachman does, he is also one of the shining stars of our plaintiffs' bar as well as an excellent criminal defense lawyer. He has been litigating since his graduation from the U.P.R. Law School in 1968, with a three-year interruption (1969-1972) while he served in the armed forces. From 1972 to 1979 he was associated with the law firm of Calderón, Rosa-Silva and Vargas. He has been a solo practitioner since 1979. Mr. Anduze claims 869.25 hours of work

to be paid at a rate of $150 per hour. He has not had fixed billing rates since being on his own. Most of his work is done on a contingency basis. He testified that his rates during the 1979-80 period fluctuated between $100 and $150 and his current rates vary between $100 and $200. Mr. Anduze states in his application that $150 is "his current billing rate."

Mr. Fernández Seín was recruited by Mr. Nachman in 1978. They struck a deal under which Mr. Nachman provided Mr. Fernández Seín with office space in exchange for 25 hours of work a month in this case. Mr. Fernández Seín graduated from the U.P.R. Law School in 1966. Between 1966 and 1973 he litigated with private firms, mostly on behalf of insurance companies. From 1973 to 1976 he worked for the Commonwealth government, first as legal counsel to the Right to Work Administration and then as a Special Assistant to the Governor. In 1977 he joined Legal Services as a staff attorney for its litigation division. A year later he was promoted to supervisor of his division, position that he held until 1979. During his years at Legal Services, Mr. Fernández Seín became very involved in the prisoner's rights cause. He filed several class actions on behalf of prisoners. With Mr. Pérez Bachs, he was one of the Island's very few "experts" in prisoner's cases at the commencement of this case. Mr. Fernández Seín shared office space with Mr. Nachman until becoming his associate in 1983 and his full partner in 1984. He requests an award for 2,480 hours worked to be paid at $150 an hour. We do not know what were his hourly rates from 1979 to 1983. Since then his rates have been $125 per hour between 1984 and 1985, and $150 per hour since January 1986. Like Mr. Nachman, however, most of his work is done on a contingency basis.

Mr. Ramos joined the team of plaintiffs' attorneys in 1979 while working at Legal Services. He was one of the three lawyers Mr. Nachman bargained in exchange for the seminars. Mr. Ramos was employed by Legal Services in

January 1979, some months after his graduation from the U.P.R. Law School. He remained there until late 1980, when he joined the faculty of the Inter American University Law School. Among other courses, he has taught a prisoner's rights seminar since joining the faculty. He has remained active in this case while teaching and has acted as court-appointed counsel in several other prisoners' and civil rights cases in this as well as the Commonwealth courts. He took a sabbatical year between 1986 and 1987 to obtain his Master in Law degree from the University of California at Berkeley. Mr. Ramos requests an award for 582.5 worked hours at $100 per hour. All hours claimed occurred after he left Legal Services. He has never had any fixed billing rates because he has not assumed any representation on such basis.

III.

A brief summary of the fees' proceeding must be told. On prior occasions we have noted the contentiousness and the excessive adversariness with which defendants have met the claims made by the plaintiff class. *Feliciano*, 497 F.Supp. at 17; *Morales Feliciano*, 672 F.Supp. at 595; and *Opinion and Order* of July 28, 1988, 697 F.Supp. at pp. 47-48. This incident is no exception to the stonewalling, dilatory tactics used by the defendants. They have made every atempt to make sure that "[t]his fee litigation [would result] in what the Court in *Hensley* warned against; 'a second major litigation.' " *Rogers v. Okin*, 821 F.2d 22, 28 (1st Cir. 1987), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). Months before the hearing on these applications, defendants had received from plaintiffs' attorneys statements in support of their applications. These statements itemized for each attorney the service for which payment was claimed as well as the date and the time spent on each occasion. A few days before the date in which the hearing was first scheduled, defendants moved to take

depositions and for production of documents. We denied the motion for the taking of depositions, modified the request for production of documents and granted the defendants additional time to prepare for the hearing.

Not unexpectedly, the showing made by defendants at the hearing was weak. Broad-gauged attacks on duplication of work or challenges to the claims made by plaintiffs' attorneys followed the same pattern of litigation that has characterized this case. The fact that an immense amount of work had been performed for the plaintiff by first-rate lawyers could not be contested. We had anticipated attacks on particularized claims to match the requests for information and for time to prepare for this hearing. The defendants never went beyond vagueness and protestation.

The one witness which the defendants brought before the Court only established the bad faith with which he had been treated by the defendants. Jorge Segarra Olivero, Esquire, Executive Director of Puerto Rico Legal Services, Inc., had settled the claims made by that corporation on the clear understanding that he would not be required to give evidence on this matter. Defendants nevertheless subpoenaed him, by surprise, to try and elicit from him the testimony which they had agreed not to require from him.

The applicants base their fee award petition on 42 U.S.C. § 1988 (1981). Since the claim on which we have ruled as to the unconstitutionality of the prison system is based on 42 U.S.C. § 1983 (1981), we "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Plaintiffs clearly are prevailing parties under section 1988. *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). We so held on March 20, 1986. Defendants have not challenged that fact. We will thus award reasonable fees in favor of plaintiffs' attorneys.

It is settled law that to calculate attorney's fees under section 1988 a two-step process must be followed. *Hensley v. Eckerhart*, 461 U.S. 424, 433-434, 103 S.Ct. 1933, 1939-

1940, 76 L.Ed.2d 40 (1983). We first have to multiply hours reasonably expended by each prevailing attorney times a reasonable hourly rate, to arrive at the "lodestar" of a reasonable fee. This lodestar is "presumed to be the reasonable fee to which counsel is entitled." *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) (*Delaware Valley I*). Then we may, in exceptional cases, make upward adjustments to the lodestar figure in light of various factors which are not accounted for in it, such as risk of nonpayment, delay in payment, and undesirability or importance of the case. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ___U.S. ___, 107 S.Ct. 3078, 3081-3082, 97 L.Ed.2d 585 (1987) (*Delaware Valley II*).

A.

To determine the number of reasonable hours that each of plaintiffs' attorney should be paid for, we take the "hours actually spent and then substract from that figure hours which were duplicative, unproductive, excessive or otherwise unnecessary." *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984). During the attorneys' fees hearing defendants made general allegations that plaintiffs' attorneys overstaffed court appearances and negotiation meetings.[4] Defendants unfortunately did not specify which hours should have been reduced. Notwithstanding, we do not think their allegations have any merit.

As explained during the hearing, and a matter of which this Court has intimate knowledge, plaintiffs' attorneys had to divide up their work by "committees". During the discovery period in 1979 and 1980, they split among themselves the nineteen penal institutions involved in this case. When the time came to argue the 1980 preliminary in-

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[4] See August 15, 1988, Transcript ("Tr. 8/15/88"), pp. 107-110.

junction in court or when the 1986 stipulation was negotiated, lawyers with first-hand knowledge of all institutions had to be present. Furthermore, the work was also divided by tasks. Messrs. Fernández Seín, Nachman and Ramos did most of the discovery and, thus, had a better command of the facts. They obviously had to be present in court or at the negotiating table. Mr. Anduze did not do much field work, but co-counsel needed him to be on top of all the technical aspects of courtroom appearances. His expertise in such matters made him the perfect choice for that task. In sum, the factual and procedural complexity of a class action challenging the constitutionality of the confinement conditions in nineteen penal institutions required the presence of the plaintiffs' attorneys that appeared in court or at the negotiating table.

Defendants did not make any other specific challenges to the reasonability of the claimed hours. They rightly did not do so because the claimed hours are more than reasonable. This Court knows that all applicants underrepresented the hours worked in this case. They so testified during the hearing without being challenged by defendants. A couple of examples illustrate our point. During 1983 Mr. Nachman claims compensation for 9.5 hours and calculates that at least 100 hours were not reported because of difficulty in reconstructing time records. We know that he worked more than 9.5 hours that year and that his underrepresentation estimate for that year is very modest. Mr. Pérez Bachs' claimed hours offer another fine example. He asks for compensation for time spent on only 2 phone calls, 2 visits to institutions and 2 meeting with co-counsel. He certainly did many more than those in 12 years of litigation. We could go on and on with such examples.

Finally, we believe that the claimed hours are more than reasonable in light of defendants' contentiousness and lack of compliance with this Court's orders. It must be stressed

that the prison conditions were declared unconstitutional more than eight years ago. Plaintiffs' attorneys are still litigating this case because of defendants' irresponsibility. And, as we have held before, *Feliciano*, 479 F.Supp. at 17; *Morales Feliciano*, 672 F.Supp. at 595, defendants' conduct throughout the whole litigation has been, to put it mildly, obstreperous. They have opposed, sometimes viciously, every discovery attempt or motion by plaintiffs.[5] "The government cannot litigate tenaciously [in this case, excessively] and then be heard to complain about the time necessarily spent by plaintiffs in response." *Jacobs v. Mancuso*, 825 F.2d 559, 562 (1st Cir. 1987), *quoting from, City of Riverside v. Rivera*, 477 U.S. 561, n. 11, 106 S.Ct. 2686, n. 11, 91 L.Ed.2d 466 (1986).

In light of all that has transpired in this case, we will compensate plaintiffs' attorneys for all the hours claimed in their applications—Mr. Nachman for 2810 hours; Mr. Pérez Bachs for 385.75 hours; Mr. Anduze for 869.25 hours; Mr. Fernández Seín for 2480 hours; and Mr. Ramos for 582.5 hours.

B.

As to the reasonable compensation for each hour worked, plaintiffs' attorneys believe to be entitled to be paid at their current hourly billing rates (except for Mr. Ramos, who does not have fixed rates). As previously indicated, their billing rates have increased periodically since the commencement of this case—Mr. Nachman's from $125 to $200; Mr. Pérez Bachs' from $70 to $180; Mr. Anduze's from $100-150 to $100-$200; and Mr. Fernández Seín's from $125 (in 1984) to $150. They want to be paid current

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[5] The latest example was the Secretary of Justice's complete disobeyance of this Court's July 13, 1986, order to produce documents in relation to the attorneys' fees issue. We could have held him in contempt but reluctantly refrained from doing so because that would have further delayed the attorney's fees award.

rates given the close to nine years of inflation depreciating the value of the dollar and lost interest income that could have been generated if fees had been paid when their services were provided.

We sympathize with plaintiffs' argument but are constrained by our Court of Appeals decision in *Rogers v. Ohio*, 821 F.2d 22 (1st Cir. 1987), which itself was bound to apply the principles in *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). The *Rogers* holding is clear: unless the sovereign, in this case the Commonwealth, waives its immunity under the Eleventh Amendment, we can neither award lost interest nor take into consideration the delay-in-payment factor when assessing a reasonable fee under 42 U.S.C. § 1988. *Rogers*, 821 F.2d at 26-27. By ignoring this key factor we believe to be unduly penalizing plaintiffs' attorneys. Unfortunately, there is nothing we can do but echo our Court of Appeals' request:

> We are not happy about this result from a policy standpoint; indeed, particularly where private and unfunded counsel are expected to be enlisted to assist the private attorney general plaintiff[s], one can hardly overestimate the chilling effect of an interminable wait for payment in sharply shrunken dollars. The situation cries out for congressional remedy.

Rogers, 821 F.2d at 28.

We have no choice but to do what the *Rogers* court did: use the attorney's historical rates as a point of reference in determining a reasonable fee. As to Messrs. Anduze and Fernández Seín, of whom we do not have historical rates for some years or, as to Ramos, who has no such rates, we will have to determine what would have been their reasonable historical rates for those years.

It is fair to treat Messrs. Anduze and Fernández Seín as one person for purposes of assessing rates. They have

been practicing law for almost the same number of years (Mr. Anduze, 20 years; Mr. Fernández Seín, 22 years). Both have been actively litigating civil rights cases since the late 1970's. Mr. Fernández Seín has been involved in this case maybe a few months longer than Mr. Anduze. They are equally well-respected within the Puerto Rican legal community.

As noted before, *supra*, pp. 54-55, both of them offered some testimony as to historical rates. Mr. Anduze said his 1979-80 hourly rates ranged from between $100 and $150 and currently go from between $100 and $200. He indicated in his application that $150 is his current rate. Mr. Fernández Seín's historical rates were $125 during the 1984-85 period and since January 1986 they have been fixed at $150. We also have rates that they have been assigned in previous civil rights cases. Mr. Anduze's hours were valued at $150 for in-court and $100 for out-of-court in a recent civil rights case. Mr. Fernández Seín has been awarded fees by this Court in the following civil rights cases: *Morales v. Romero Barceló*, Civil No. 80-1783—$100 per hour awarded in 1983; *Wildman v. Lerner Stores*, 771 F.2d 605 (1st Cir. 1985)—$100 per hour awarded in 1984; *Vázquez v. Racing Sport Adm.*, Civil No. 82-2796—$100 per hour awarded in 1984; *Cristóbal v. Romero Barceló*, Civil No. 81-0006—$125 per hour in 1986; *Valdivieso v. Burgos*, Civil No. 82-1430—$125 per hour in 1986; *Baldomero Arbona v. Awilda Aponte Roque*, Civil No. 85-1367—$150 per hour awarded in August 11, 1988.

With all this professional background and fee data in mind, we fix Messrs. Anduze's and Fernández Seín's historical hourly rates in the following fashion: $110 for the 1979 and 1980 years; $120 for the 1981 and 1982 years; $130 for the 1983 and 1984 years; $140 for the 1985 and 1986 years; and $150 for 1987. The $10 increase every two years is to reflect what is obvious to all of us in the legal profession: an attorney's rate goes up as he or she accumulates years of experience. We believe these rates

are reasonable approximations of what would have been the prevailing market rates for civil rights lawyers with the skill, experience and reputation of Messrs. Anduze and Fernández Seín.

Mr. Ramos stands on a different footing. He had been practicing law for nine years. Although we have only but praise for his abilities as a litigator, his experience in court is far less than those of his fellow attorneys. Knowing the legal fees' market, these factors would have certainly been reflected in the rates Mr. Ramos could have commanded if he had worked on a fixed rate basis. With that in mind, we believe the market would have valued Mr. Ramos' hourly rate in the following fashion: $60 an hour during 1980 and 1981; $80 an hour during 1982 and 1983; $100 an hour during 1984 and 1985; and $120 an hour in 1986 and 1987. The $20 increase every two years is to account for the fact that, as we said before, lawyer's rates go up with years of experience. The bianual increases are higher than those we assigned to Messrs. Anduze and Fernández Seín because the experience a young lawyer acquires during the early years of his or her career is usually more valuable than what he can learn after fifteen or twenty years in the profession.

The rate-fixing task does not end with the determination of historical rates. We also must assign different rates to different tasks following the practice approved by our Court of Appeals and the Supreme Court of the United States. *See United States of American v. Metropolitan District Commission*, 847 F.2d 12, 19 (1st cir.1988); *Jacobs*, 825 F.2d at 561, n. 3; *Miles v. Sampson*, 675 F.2d 5, 9 (1st Cir. 1982); *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir.1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980); *Delaware Valley I*, 106 S.Ct. at 3099.

Two factors come to mind in trying to differentiate the tasks performed by plaintiffs' attorneys in this case: (a) how much legal skill and ability is required by the task; and

(b) how emotionally and mentally demanding is the task. For example, an hour in court or brief-drafting will be more valuable than fact-finding tasks, which in this case would be, among others, visits to the prison or interviews with prisoners. By the same token, since an hour of deposition-taking is usually not as legally and mentally exacting as an hour of writing letters or reviewing documents, the former will be priced higher than the latter.

In light of those principles, we have divided up the tasks performed by plaintiffs' attorneys in three categories. They will be awarded a fraction of or full historical hourly rate depending on which category the task falls. The categories are:

> 1) Low: includes notifications and visits to the penal institutions; prisoners' interviews; conferences with co-counsel or adversaries (unless otherwise categorized); drafting of letters; drafting and reading of intra-counsel memoranda; proofreading and copyreading; notification of and preparation for deposits; review of documents; telephone conversations; and travel time.

Hours falling under the low category will be compensated at 60 percent of the applicable historical rate.

> 2) Medium: includes general research; taking of and attendance to depositions; preparations for court hearings or conferences (if so specified on the time records); preparation of subpoenas, class notices, interrogatories and answers to them, prisoners' questionnaires, and affidavits; unspecified meetings with monitors; preparation for prisoner rights' seminar; and preparation of fee applications.

Hours falling under the medium category will be compensated at 80 percent of the applicable historical rate.

> 3) High: includes court appearances and in-chambers conferences; legislature and administrative agencies'

appearances; jail visits with the judge; preparation and drafting/dictation of motions and briefs; negotiations toward stipulation with court monitors and defendants.

Hours falling under the high category will be compensated at the full applicable historical rate.

The composition of the team of plaintiffs' counsel comples us to implement the categories. Four out of five applicants command very high hourly rates, and rightfully so, given their sill and reputation. This case had to be managed by lawyers of their caliber. By the same token, not all tasks to be performed had to be done by lawyers of their extraordinary capacity. An analogy with a large law firm illustrates our point. If plaintiffs would have been represented by such a firm, tasks in the low and medium categories could have been delegated, partly or totally, to associates or junior partners charging a lower fee. By valuing the applicants' claimed hours at 60 or 80 percent of their historical value, we superimpose such hierarchy in an attempt to arrive at a reasonable fee award.[6] The use of the historical rates as a reference point reflects the fact that, although task differentiation is appropriate, we must not forget their skill and reputation. An "associate hour" of work by any of the applicants will obviously be more efficient and, therefore, more valuable, than a "real associate" hour.

IV.

The implementation of the guidelines in Part III of this opinion result in the following "lodestars":[7]

[6] We start categorizing Mr. Ramos' hours after 1985, when he becomes a "partner" in this imaginary law firm. Pre-1985 hours are valued at "associate" rates and, thus, need not be further reduced through categorization. After 1985, his hours in the low and medium categories are priced at 75 percent of his historical rate.

[7] See Appendixes A and B for an annual breakdown per category for each applicant.

Mr. Nachman:	$337,422.50
Mr. Pérez Bachs:	$35,235.00
Mr. Anduze:	$84,197.50
Mr. Fernández Seín:	$228,151.50
Mr. Ramos:	$41,075.00

These "lodestars" are "presumed to be the reasonable fee to which counsel are entitled." *Delaware Valley II*, 106 S.Ct. at 3098, *quoting from Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). We believe, however, that this is one of the exceptional cases where an upward adjustment is appropriate based on three factors:[8] (a) The undesirability of this case, (b) the public importance of this case, and (c) counsel for plaintiffs' preclusion of more remunerative employment due to the acceptance of this case. An explanation ensues.

Plaintiffs' representation is undesirable because their cause is unpopular. The prisoners' cause is repudiated in a community, like Puerto Rico, infested with crime. The Island's largest cities, San Juan and Ponce, have among the worst murder-per-capita rates in the United States. Robberies, rapes, drug deals, and other felonies are so

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[8] We would have considered another enhancement factor, risk of loss, but unfortunately plaintiffs' attorneys did not present the quite specific evidence required in *Delaware Valley II*. That case sets forth two criteria for awarding such enhancement. Justice O'Connor together with four dissenting justices (Blackman, Brennan, Marshall and Stevens) held that "compensation for contingency must be based on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the riskiness of any particular case." *Delaware Valley II*, 107 S.Ct. at 3089. (O'Connors, J. concurring) A different majority (Chief Justice Rehnquist and Justices White, Powell, Scala and O'Connor) held that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market'." *Id.* at 3091 (O'Connor, J. concurring, *quoting* White, J. plurality) Plaintiffs' attorneys made neither showing. *See McKenzie v. Kennickell*, 684 F.Supp. 1097 (D.D.C.1988).

common Puerto Ricans see them as a part of every day life. The general population's attitude toward those who commit or are accused of committing crimes is understandably one bordering in despise. Many Puerto Ricans believe that since plaintiffs are criminals, they deserve the conditions under which they live in the prisons. We must also note that Puerto Rico is decades behind the United States in the prisoners' rights movement. While prisoners in the State fought over their rights to law books in the 1970's, Puerto Rican prisoners fought, and still are fighting, over a humane amount of living space. Prisoners' rights had been completely ignored by our government and, sadly, by our legal community until the commencement of this litigation.

The case is also undesirable because it involves grueling work. In January 1989, this litigation will be ten years old. More than a thousand motions have been filed. Transcripts of in-court proceedings cover hundreds of pages. Expert witnesses had to be procured in the United States. Videos and hundreds of photos were taken and introduced into evidence.

This is not the typical plaintiff in a civil rights' case who knocks on the lawyer's door. Access to plaintiffs was a severe problem. Plaintiffs' counsel had to travel throughout the Island's twenty-four institutions to visit their clients, a task made more difficult when prisoners are being constantly moved from institution to institution to prevent them from consulting with their lawyers. Hundreds of inmates were inerviewed. A further complication was that plaintiffs' attorneys had to rely on their clients' word as to prison conditions. Before we ordered defendants to open up the institutions, plaintiffs' attorneys were not allowed to visit them. It is a very difficult task to build up a case when a lawyer is unable to investigate the facts for himself. Finally, and more importantly, having to go in and out of prisons for nine years is undesirable in itself, and that normal discomfort reaches depressive levels when

the institutions are as ill-kept as those under defendants' control. We have commented extensively on the institutions' grim conditions elsewhere. *See Feliciano*, 479 F.Supp. 14; *Morales Feliciano*, 672 F.Supp. 591. Plaintiffs' lawyers have had to deal with the Island's prison bureaucracy, which has demonstrated to be totally inefficient and uncooperative.

The case's undesirability is further compounded by its economic effects on the practice of plaintiffs' counsel. Applicants in private practice have spent many hours of billable time in this case when they could have been billing rates higher than those we have allowed them or taking cases on contingency basis that would hve resulted in higher paychecks.[9] To illustrate our point, we have allowed them to charge 60 or 80 percent of what were or would have been their historical rates for 59 percent of the hours claimed by Mr. Nachman; 56 percent of the hours claimed by Mr. Pérez Bachs; 49 percent of the hours claimed by Mr. Anduze; and 68 percent of the hours claimed by Mr. Fernández Seín. Of course, we recognize that their billing rates "at best afford relevant comparisons," *U.S. v. Metropolitan District Commission*, 847 F.2d 12, 17 (1st Cir.1988), *quoting from Blum*, 465 U.S. at 895-896 n. 11, 104 S.Ct. at 1547-1548 n. 11 and, that we are therefore not compelled to base our award on those rates. "It is precisely because there is no external market-based check upon the scope of counsel's efforts in such a case that it falls to the court to act as the guarantor of fairness." *Metropolitan*, 847 F.2d at 17. On the other hand, we may not completely ignore the aforementioned percentages, especially knowing that these lawyers did not take this case voluntarily.

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[9] Mr. Ramos is not affected by this economic factor because he is not in the private practice. Working on this case certainly has precluded him from doing more enjoyable things but not from assuming more remunerative representations.

The public importance of this case is enormous. Plaintiffs' attorneys are the pioneers of the prisoners' rights movement in Puerto Rico. Without their initiative, more than 8,000 citizens would probably still be held under custody in violation of their basic constitutional rights. Plaintiffs' attorneys took it upon themselves to achieve an imperative prison reform and at least have laid out a solid ground on which to build it. They have not done more because of defendants' protraction. It is up to defendants to comply with the minimal requirements this Court has imposed.

Quantifying these three award enhancement factors is far from an exact science. But mindful of the frowning at multipliers in recent case law of our Court of Appeals and the Supreme Court, *Delaware Valley I*, 106 S.Ct. at 3098; *Cortés Quinones v. Jiménez Nettleship*, 842 F.2d 556, 564 (1st Cir.1988), we will increase each applicant's lodestars of Messrs. Nachman, Pérez Bachs, Anduze and Fernández Seín will be increased by 30 percent and Mr. Ramos' lodestar will be increased by 20 percent. The awards will therefore be:

Mr. Nachman:	$438,649.25
Mr. Pérez Bachs:	$45,805.50
Mr. Anduze:	$109,456.75
Mr. Fernández Seín:	$296,596.95
Mr. Ramos:	$49,290.00

IT IS SO ORDERED.

Appendix A to Opinion and Order of the District Court of Puerto Rico, *Morales Feliciano v. Hernández Colón*, Civil No. 79-4 (PG), Slip op., entered on September 13, 1989

This is a breakdown, by the categories defined in Part B III of the opinion, of the annual fees (without multipliers) we are awarding in favor of Messrs. Nachman, Pérez Bachs, Anduze and Fernández Seín. The following is the model/description of how the calculations were made:

YEAR X (year X's historical rate)

Low category hours claimed x 60% of year X's historical rate = fees awarded for low category hours in year X.

Medium category hours claimed x 80% of year X's historical rate = fees awarded for medium category hours in year X.

High category hours claimed x 100% of year X's historical rate = fees awarded for high category hours in year X.

Total hours claimed for year X/Lodestar (total fees awarded (without multiplier) for year X).

MR. NACHMAN

1979 ($125)

192.5	x $ 75	=	$14,437.50
63	x $100	=	6,300.00
36.5	x $125	=	4,562.50
292			$25,300.00

1980 ($150)

596.75	x $ 90	=	$ 53,707.50
169.25	x $120	=	20,310.00
608.25	x $150	=	91,237.50
1374.25			$165,255.00

1981 ($150)

160.5	x $ 90 =	$14,445.00
16.75	x $120 =	2,010.00
234.75	x $150 =	35,212.50
412		$51,667.50

1982 ($150)

19	x $ 90 =	$ 1,710.00
0	x $120 =	00.00
62.25	x $150 =	9,337.50
81.25		$11,047.50

1983 ($150)

3.5	x $ 90 =	$ 315.00
0	x $120 =	00.00
6	x $150 =	900.00
9.5		$1,215.00

1984 ($150)

56.75	x $ 90 =	$ 5,107.50
7	x $120 =	840.00
38.5	x $150 =	5,775.00
102.25		$11,722.50

1985 ($150)

66	x $ 90 =	$5,940.00
7.75	x $120 =	930.00
6	x $150 =	900.00
79.75		$7,770.00

1986 ($175)

171.25	x $105 =	$17,981.25
16.50	x $140 =	2,310.00
74.25	x $175 =	12,993.75
262		$33,285.00

1987 ($200)

111.75	x $120 =	$13,410.00
7.50	x $160 =	1,200.00
77.75	x $200 =	15,550.00
197		$30,160.00

Total hours 2810 / Lodestar $337,422.00

MR. PÉREZ BACHS

1976 ($70)

1.25	x $ 42 =	$ 52.50
0	x $ 56 =	00.00
11.75	x $ 70 =	822.50
13		$875.00

1977 ($80)

6.75	x $ 48 =	$ 324.00
2	x $ 64 =	128.00
11.25	x $ 80 =	900.00
20		$1,352.00

1978 ($90)

8.75	x $ 54 =	$ 472.50
32	x $ 72 =	2,304.00
9.25	x $ 90 =	832.50
50		$3,609.00

1979 ($100)

25.5	x $ 60 =	$1,530.00
8.5	x $ 80 =	680.00
24.5	x $100 =	2,450.00
58.5		$4,660.00

1980 ($110)

20.5	x $ 66 =	$ 1,353.00
9.5	x $ 88 =	836.00
71.25	x $110 =	7,837.50
101.25		$10,026.50

1981 ($125)

40.75	x $ 75 =	$3,056.25
7.50	x $100 =	750.00
42.75	x $125 =	5,343.75
91		$9,150.00

1982 ($135)

14.5	x $ 81 =	$1,174.50
0	x $108 =	00.00
0	x $135 =	00.00
14.5		$1,174.50

1983 ($140)

5	x $ 84 =	$420.00
0	x $112 =	00.00
0	x $140 =	00.00
5		$420.00

1984 ($150)

4	x $ 90 =	$360.00
0	x $120 =	00.00
0	x $150 =	00.00
4		$360.00

1985

0	0

1986 ($160)

1.25	x $ 96 =	120.00
27.25	x $128 =	3,488.00
0	x $160 =	00.00
28.50		$3,608.00

Total hours 385.75 / Lodestar $35,235.00

MR. ANDUZE

1979 ($110)

26	x $ 66 =	$1,716.00
15	x $ 88 =	1,320.00
0	x $110 =	110.00
41		$3,036.00

1980 ($110)

141	x $ 66 =	$ 9,306.00
59	x $ 88 =	5,192.00
272.75	x $110 =	30,002.50
472.75		$44,500.50

1981 ($120)

38	x $ 72 =	$ 2,736.00
0	x $ 96 =	00.00
137.5	x $120 =	16,500.00
175.5		$19,236.00

1982 ($120)

9.5	x $ 72 =	$684.00
0	x $ 96 =	00.00
0	x $120 =	00.00
9.5		$684.00

1983 ($130)

2	x $ 78 =	$156.00
0	x $104 =	00.00
0	x $130 =	00.00
2		$156.00

1984 ($130)

7.75	x $ 78 =	$ 604.50
0	x $104 =	00.00
7.5	x $130 =	975.00
15.25		$1,579.50

1985 ($140)

39.25	x $ 84 =	$3,297.00
0	x $112 =	00.00
8.5	x $140 =	1,190.00
47.75		$4,487.00

1986 ($140)

35.5	x $ 84 =	$2,982.00
4.75	x $112 =	532.00
0	x $140 =	00.00
40.25		$3,514.00

1987 ($150)

43.5	x $ 90 =	$3,915.00
5.75	x $120 =	690.00
16	x $150 =	2,400.00
65.25		$7,005.00

Total hours 869.25 / Lodestar $84,197.50

MR. FERNÁNDEZ SEÍN

1979 ($110)

157.75	x $ 66 =	$10,411.50
129.25	x $ 88 =	11,374.00
6.5	x $110 =	715.00
293.5		$22,500.50

1980 ($110)

435.75	x $ 66 =	$28,759.50
145.25	x $ 88 =	12,782.00
414	x $110 =	45,540.00
995		$87,081.50

1981 ($120)

136.5	x $ 72 =	$ 9,828.00
14.5	x $ 96 =	1,392.00
168	x $120 =	20,160.00
319		$31,380.00

1982 ($120)

67.25	x $ 72 =	$4,842.00
29	x $ 96 =	2,784.00
8	x $120 =	960.00
104.25		$8,586.00

1983 ($130)

39.75	x $ 78 =	$ 3,100.50
49.5	x $104 =	6,188.00
90.75	x $130 =	11,797.50
190		$21,086.00

1984 ($130)

107.5	x $ 78 =	$ 8,385.00
4	x $104 =	416.00
12	x $130 =	1,560.00
123.5		$10,361.00

1985 ($140)

90.75	x $ 84	=	$ 7,623.00
14.75	x $112	=	1,652.00
26.25	x $140	=	3,675.00
131.75			$12,950.00

1986 ($140)

107.25	x $ 84	=	$ 9,009.00
52.50	x $112	=	5,880.00
17.5	x $140	=	2,450.00
177.25			$17,339.00

1987 ($150)

76.25	x $ 90	=	$ 6,862.50
14	x $120	=	1,680.00
55.5	x $150	=	8,325.00
145.75			$16,867.00

Total hours 2480 / Lodestar $228,151.50

Appendix B to Opinion and Order of the District Court of Puerto Rico, *Morales Feliciano v. Hernández Colón*, Civil No. 79-4 (PG), Slip op., entered on September 13, 1989

This is a breakdown, by categories during 1986 and 1987, *see* n. 4, of the annual fees (without multipliers) we are awarding in Mr. Ramos' favor:

1980-81

404.5 hours x $60 hourly rate = $24,270.

1984-85

15 hours x $80 hourly rate = $1,200.

1984-85

84.5 hours x $100 hourly rate = $8,450.

1986-87 ($120 hourly rate)

75.5 hours in low and medium categories x $90 (75% hourly rate) = $6,795.

3 hours in high category x $120 (full hourly rate) = $360.

Total hours 582.5/Lodestar $41,075.00

APPENDIX E

Before

Campbell, *Chief Judge*,
Bownes and Breyer, *Circuit Judges*.

ORDER OF COURT

Entered May 10, 1989

The parties in cases numbered 89-1193, 89-1194 and 89-1195 have appealed from the district court's order awarding interim attorneys' fees under 42 U.S.C. § 1988 for services rendered over a ten year period in connection with efforts to improve prison conditions in the Puerto Rico correctional system. The relief obtained thus far included a preliminary injunction, a stipulation between the parties and the appointment of monitors to ensure compliance therewith. No final judgment has been rendered to date.

Although the appellants in all three cases agree that the appeals should go forward, we conclude that the appeals must be dismissed for lack of jurisdiction. An interim award of attorneys' fee is not a final order, appealable under 28 U.S.C. § 1291. *See e.g., Appeal of Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Hillery* v. *Rushen*, 702 F.2d 848 (9th Cir. 1983); *Hastings* v. *Maine-Edwell Central School District*, 676 F.2d 893 (2d Cir. 1982); *Ruiz* v. *Estelle*, 609 F.2d 118 (5th cir. 1980). In the cases before us, the order awarding fees does not finally dispose of either the underlying litigation or the fee issue itself, and therefore cannot be construed as final. We distinguish *Brewster* v. *Dukakis*, 786 F.2d 16 (1st Cir. 1986), raised by appellants in 89-1194. In *Brewster*, we reviewed an award of attorneys' fees made for work performed after the entry of a consent decree. Our review of these continuing post-judgment monitoring fees is not dispositive of the appealability of interim fees under § 1291.

The appellants' arguments, in the alternative, for application of the collateral order exception as expressed by *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), are also unavailing. We have analyzed the *Cohen* doctrine to require an interlocutory order to satisfy four criteria in order to be appealable: separability, finality, urgency and importance. *In re Continental Investment Corp.*, 637 F.2d 1, 5 (1st Cir. 1980). We have also found that urgency should be the central focus, and perhaps even the dispositive criterion of appellate jurisdiction over such orders. *Id.* at 6. We conclude that the claims of the parties are not "urgent" for purposes of the collateral order doctrine. Whether a claim satisfies the urgency requirement turns on whether irreparable harm would result to the appellants not from the order itself, but from a delay in obtaining appellate review of that order. *Id.* at 5. Other than speculative claims that the fees, once paid, may not be recoverable, the appellants making the claim of irreparable harm have failed to show that delaying appellate review of the fee award will destroy the legal and practical value of an appeal, or that it would make an effective review impossible. Absent special circumstances, such as those shown by the particular fee arrangements in *Palmer* v. *City of Chicago*, 806 F.2d 1316 (7th Cir.), *cert. denied*, 481 U.S. 1049 (1986), the payment of money usually does not inflict irreparable harm, since the money can always be refunded. *E.G., Mulay Plastics Inc.* v. *Grand Trunk Western R. Co.*, 742 F.2d 369 (7th Cir. 1984), *cert. denied*, 470 U.S. 1037 (1985); *Kordich* v. *Marine Clerk's Association*, 715 F.2d 1392 (9th Cir. 1983); *Eastern Maico Distributors, Inc.* v. *Fahrezeugfabrik G.m.b.H.*, 658 F.2d 944 (3d Cir. 1981).

While we recognize that the instant case involves a substantial amount of money, the appellants who have been ordered to pay the fees have not persuaded this court that a delay in review of the fee award will be significantly detrimental under the guidelines of *Cohen*. We add further

that, as to the finality requirement of *Cohen*, there is no indication that the order awarding fees finally resolves that issue. Having concluded that appellants' claims have failed to satisfy two of the four criteria required to satisfy the collateral order exception, we see no need to analyze the remaining criteria of importance and separability.

In light of the foregoing discussion, the appeals numbered 89-1193, 89-1194 and 89-1195 are hereby dismissed without prejudice, for the reason that this court lacks jurisdiction to consider them.

By the Court:

/s/ Francis P. Scigliano

Clerk.

Supreme Court, U.S.
FILED
JUN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1904

SUPREME COURT OF THE UNITED STATES

October Term, 1989

Rafael Hernández Colón, et al.,

Petitioners,

v.

Carlos Morales Feliciano, et al.,

Respondents.

On Petition For A Writ of Certiorari To The
United States Court of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Statement of the Case

In an on-going civil rights class action dating back to 1979,[1] which, in turn, had absorbed by consolidation similar cases dating back to 1976,[2] and which continues to be litigated

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1. Feliciano v. Barceló, 497 F. Supp. 14 (D.P.R. 1980). See Morales Feliciano v. Hernández Colón, 672 F. Supp. 627 (D.P.R. 1987); Morales Feliciano v. Hernández Colón, 697 F. Supp. 26 (D.P.R. 1987); Morales Feliciano v. Hernández Colón, 697 F. Supp. 37 (D.P.R. 1988); Morales Feliciano v. Hernández Colón, 704 F. Supp. 16 (D.P.R. 1988); Morales Feliciano v. Parole Bd. of Com. of P.R., 887 F. 2d 1 (1st Cir. 1989), cert. den. 108 L.Ed. 2d 646 (1990).

2. Morales Feliciano v. Romero Barceló, 672 F. Supp. 591 at 593, n. 1 (D.P.R. 1986).

to this day, as recently witnessed by this Court,[3] the United States District Court for the District of Puerto Rico made an award of interim attorneys' fees on September 20, 1988 (the "1988 interim fee award"). Morales Feliciano v. Hernández Colón, 697 F. Supp. 51 (D.P.R. 1988); Pet. Ap. 24a-52a. This 1988 interim fee award was overdue because the District Court had recognized that respondents had long been prevailing parties (Pet. Ap. 31a) and their counsel had been serving without compensation for years and years.

Both sides appealed the 1988 interim fee award to the United States Court of Appeals for the First Circuit. Three appeals were docketed with that court, nos. 89-1193, -4 and -5. No review was sought by writ of prohibition. On May 10, 1989, in an unpublished decision, the Court of Appeals dismissed all of them "for lack of jurisdiction." Pet. Ap. 53a. It ruled that the 1988 interim fee award "is not a final order, appealable under 28 U.S.C. 1291." Id. It also ruled that "the collateral order exception as expressed by Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)" was "unavailing" to support immediate appellate review of the 1988 interim fee award. Pet. Ap. 54a. Thus, "appeals numbered 89-1193, 89-1194 and 89-1195" were "dismissed without prejudice, for the reason

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3. No. 89-1016, Colón, Gov. of Puerto Rico v. Feliciano, 58 U.S.L.W. 3597, 108 L.Ed. 2d 646 (March 19, 1990 order denying petition for writ of certiorari).

that this court lacks jurisdiction to consider them." Pet. Ap. 55a.

Petitioners were apparently satisfied with this result, because they failed to petition this Court as they do now. Petitioners did not see fit to call the attention of this Court to any claim by them to the effect that the Court of Appeals' May 10, 1989 decision (Pet. Ap. 53a-55a) "reformulat[ed] the collateral order doctrine," thus "depart[ing] from this Court's precedents and conflict[ing] with other Court (sic) of Appeals," as they now claim (Pet. 6-13) regarding the Court of Appeals' January 5, 1990 decision (Pet. Ap. 1a-2a). In the 1988 interim fee award, the trial court had refused to grant an enhancement for delay;[4] and also refused to compensate all hours worked at 100% of the applicable "historical hourly rates," using instead reduced historical rates (60% and 80%) for some of the hours worked.[5]

In a January 10, 1989 order, the District Court had left the door open to reconsidering (or iterating) its refusal to grant an enhancement for delay, depending on the decision which this Court might render in what eventually became Missouri v. Jenkins, 491 U.S. ___, 105 L.Ed. 2d 229 (1989).

Indeed, by order of September 13, 1989, the District Court adjusted the 1988 interim fee award pursuant to Missouri v.

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4. 697 F. Supp. at 57-58; Pet. Ap. 35a.

5. Id. at 59; Pet. Ap. 38a-39a.

Jenkins (the "1989 enhancement"). Furthermore, since the 1988 interim fee award only covered work performed up to November 30, 1987, the District Court also made a second interim fee award, covering the period December 1, 1987 to July 31, 1989 (the "1989 interim fee award"); but this one did not contain any compensation for delay in the form of interest. Instead, the rates found to be current in the 1988 interim fee award were applied to this 1987-89 period. Pet. Ap. 4a-23a.

This second time, only petitioners sought review from the United States Court of Appeals for the First Circuit, at first by appeal (no. 89-1997) and, as an afterthought, by petition for writ of prohibition (no. 89-2056). Consistent with its May 10, 1989 disposition of the first round of appeals from the 1988 interim fee award (Pet. Ap. 53a-55a), on January 5, 1990 the Court of Appeals dismissed petitioners' appeal. Once again, the Court of Appeals found that Cohen was unavailing to support petitioners' appeal. "Even assuming that this appeal meets three of Cohen's four criteria, it fails, as it did before, on the ground that no irreparable injury would occur if immediate review were withheld. This factor is the core concern of the Cohen exception.... Indeed, appellants do not even raise this issue in their opposition to the motion to dismiss the appeal." Pet. Ap. 2a (emphasized). The petition for writ of prohibition was denied because it failed to "present the extraordinary circumstances necessary to grant such petition." Pet. Ap. 3a. These January 5, 1990 decisions were likewise not published.

Petitioners were not content with the Court of Appeals' January 1990 decision; but their conduct negated any claim of irreparable injury or extraordinary circumstances to support interlocutory review. Instead of immediately seeking review from this Court, they requested and obtained the longest extension of time possible, adding 60 days to the already generous 90-day period to petition for certiorari.[6] Their petition herein is dated June 4, 1990, the very last day of the extended term and 150 days after the Court of Appeals' January 5, 1990 decision. In the meantime, petitioners have paid into court what, according to them, are all of the amounts owing to respondents under the 1988 and 1989 interim fee awards and the 1989 enhancement. See Appendix hereto. This important fact is not disclosed in the petition for certiorari. In respondents' view, it permeates this whole affair with a strong aroma of mootness.[7]

Petitioners do not seem to understand what, at this stage, cannot be brought before this Court:

A. Whether or not the 1988 interim fee award (Pet. Ap. 24a-52a) was correct;

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6. Pet. 2; see Supreme Court Rules 13.1. and 13.2.

7. United States v. State Tax Commission of Mississippi, 412 U.S. 363 at 368, n. 10, 37 L.Ed. 2d 1 at 7-8, n. 10 (1973). See also Lewis v. Continental Bank Corporation, 494 U.S. ___, 108 L.Ed. 2d 400 (1990).

B. Whether or not the Court of Appeals' May 10, 1989 dismissal of the three appeals from the 1988 interim fee award (Pet. Ap. 53a-55a) was correct; or

C. Whether or not the 1989 enhancement and the 1989 interim fee award (Pet. Ap. 4a-23a) were correct.

The only issue arguably within this Court's jurisdiction, whether or not the Court of Appeals' January 4, 1990 dismissal of petitioners' appeal from the 1989 enhancement, and from the 1989 interim fee award, and its refusal to issue a writ of prohibition, were correct, is not of sufficient import to merit, by itself, review by this Court. In addition to any claim of alleged error, the issue must also merit the exercise of discretion by this Court because of particular circumstances (some of which are described in Supreme Court Rule 10.1.). Stated otherwise, the mere, isolated fact that the Court of Appeals arguably may have "erred" is insufficient to merit rectification of the alleged "error" by this Court. Additionally, there must be an inter-circuit conflict; or defiance by the Court of Appeals of controlling Supreme Court precedent; or a decision of an important question of federal law which has not been, but should be, settled by this Court.

In this particular case, in their first "reason for granting the writ" petitioners claim there is an inter-circuit conflict between the First, Fifth, Seventh and Ninth Circuits on one side and the Second and Sixth Circuits on the other; and in their second "reason for granting the writ," petitioners also

claim there is another conflict, this time between the First and Ninth Circuits. In both "reasons for granting the writ" petitioners claim that the Court of Appeals "depart[ed] from this Court's precedents." There are no inter-circuit conflicts, even superficially; and the Court of Appeals obeyed this Court's controlling precedents.

Respondents note that petitioners' allegation to the effect that the Court of Appeals "depart[ed] from this Court's precedents" is just that, a bald and unsupported claim.[8] Albeit some cases are cited, petitioners fail to explain --- even inartfully --- exactly how was it that the Court of Appeals "departed" from Cohen and its progeny; or exactly how was it that the denial of a writ of prohibition defied controlling precedent from this Court as to the standards for the issuance of such a writ. Thus, both "reasons" asserted by petitioners "for granting the writ" fail the test of Supreme Court Rule 14.5.[9]

II. Summary of the Argument: Reasons for Denying the Writ

A. This Court recently examined the same (or very similar) issues now presented by petitioners and found them

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8. Or, in petitioners' own language, an "unexplainable and unexplained" claim (Pet. 17).

9. "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying the petition."

unworthy of review. Nothing has changed since then to now make them worthy of review by this Court.

B. There is no real inter-circuit conflict regarding the first issue presented for review, especially considering that the Court of Appeals' decision herein was not published. Instead of "depart[ing] from this Court's precedents," the Court of Appeals' decision was compelled by them.

C. There is no inter-circuit conflict, nor has the Court of Appeals departed from this Court's precedents, as to the second issue presented for review.

D. The final result sought by petitioners defies long-standing policy against piecemeal appeals.

E. The final result sought by petitioners contradicts the policy against extensive, protracted, satellite fee litigation in civil rights cases.

III. Argument

A. The first issue presented for review is whether interim fee awards should be immediately appealable, as a special Cohen exception "in cases of protracted institutional reform litigation with no foreseeable finality" (or whether an enhancement to an interim fee award should be likewise appealable as still another Cohen exception). The second issue is but a subsidiary issue which depends on the first one. If an interim fee award does not qualify for Cohen appellate treatment, an enhancement to an interlocutory, non-appealable interim fee award can hardly qualify as a Cohen exception.

This Court examined the issue of the immediate appealability of interim fee awards (coincidentally, in a civil rights case strikingly similar to this one: a class action over prison conditions, No. 87-1325, Carruthers v. Durán, 56 U.S.L.W. 3654 (1988)). If anything, the similar issue presented in Carruthers was portrayed with more urgency for review by this Court because the fee awards in Carruthers were made post-final-judgment, for monitoring and enforcement of an injunctive decree, and thus it could not be held --- as the Court of Appeals ruled herein --- that the interim fee awards could eventually be reviewed by appeal as of right from the final judgment.

This Court did not find the issue presented in Carruthers worthy of review and thus certiorari was denied on June 6, 1988. 486 U.S. 1046, 100 L.Ed. 2d 627. The petition herein comes two years after that denial, almost to the day. But for that "distinguishing" factor, the basic issue remains the same and the passage of two years has not made the issue any more worthy of review. It remains just as unworthy of review as it was two years ago.[10]

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10. Although not as similar to this case as Carruthers v. Durán, but more recently, in case no. 89-1082, Jones Hirsch Connors & Bull v. U.S. District Court for the District of Puerto Rico, this Court likewise found the issue presented not to be worthy of review and thus the petition for certiorari was denied on April 30, 1990. 58 U.S.L.W. 3690, 3693 (1990). In Jones Hirsch the question presented was whether a district court order imposing sanctions against counsel was final for purposes of immediate appellate review by a federal court of appeals. 58 U.S.L.W. 3532,

B. The alleged inter-circuit conflict which petitioners attempt to construct in their first "reason for granting the writ" exists only in petitioners' imagination.

The Court may readily notice that the First Circuit's ruling herein is perfectly in accord with the views of the Second Circuit, Cullen v. Margiotta, 811 F. 2d 698 at 708 (2d Cir. 1987); the Fifth Circuit, Shipes v. Trinity Industries, Inc., 883 F. 2d 339 (5th Cir. 1989); the Seventh Circuit, Lac Courte Orreilles Chippewa Ind. v. State of Wisconsin, 829 F. 2d 601 (7th Cir. 1987); and the Ninth Circuit, Rosenfeld v. United States, 859 F. 2d 717 (9th Cir. 1988).

The First Circuit's alleged "conflict" with the views of the Second Circuit, as exemplified in Seigal v. Merrick, 619 F.2d 160 at 164 n. 7 (2d Cir. 1980) is only timidly alluded to at page 12 of the petition for certiorari. This is understandable, since the fees in Seigal were not truly interim fees in a case of "protracted institutional reform litigation with no foreseeable finality," as petitioners themselves characterize this case in their first question presented for review. Instead, the fees at issue in Seigal came at the tail-end of the case: at the settlement stage, albeit a settlement that eventually aborted, 619 F.2d at 163, and later the action was finally dismissed, 619 F.2d at 164.

3690 (1990).

The views of the Second Circuit, which are in perfect agreement with those of the First Circuit herein, are better shown in two cases to which petitioners do not refer: Hastings v. Maine-Endwell Central School District, 676 F.2d 893 (2d Cir. 1982) and Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987).

The only other "conflicting" decision to which petitioners point is found in the Sixth Circuit, Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988), and it too is distinguishable, on its particular facts, from this case. In the paragraph immediately after the one cited by petitioners at page 11 of their petition for certiorari, the Webster court explained its departure from the acknowledged rule that "ordinarily orders awarding interim fees in the course of litigation are not appealable":

> The attorney fee order of Nov. 24, 1986, imposed a prospective burden upon the State to pay large monthly fees without any definite cutoff date, without rulings on central legal issues in the case, without specific findings or conclusions concerning theories of liability and immunity and without assurances that in the event of appellate reversal on the merits the State could recover from plaintiffs' counsel the sizeable amounts already paid (a point conceded at argument by plaintiffs' counsel)....

846 F.2d at 1035.

Unlike Webster, there is no order in the instant case providing for prospective fees[11] regardless of the issues or who is the prevailing party; to the contrary, here the District Court has made so many sufficiently "specific findings or

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11. See District Court opinions cited at pages 1 and 2 of this brief in opposition.

conclusions concerning theories of liability or immunity," that petitioners readily concede (Pet. 8), as the District Court has found (Pet. Ap. 31a), that respondents have been, throughout this litigation, the prevailing parties in this case.

As the Fifth Circuit has explained in Dardar v. Lafourche Realty Co., Inc., 849 F. 2d 955 (1988), the alleged "conflict" among the circuits as to the immediate appealability of interim fee awards is more apparent than real. The different results reached by different circuits in different cases, as to the applicability of the Cohen doctrine in this context, is due to the specific facts of the particular cases or due to a failure to apply all three prongs of the test articulated in Coopers & Lybrand v. Livesay, 437 U.S. 463, 57 L.Ed. 2d 351 (1978).

Petitioners do not make a colorable claim that the Court of Appeals' decision is in such direct conflict with this Court's decision in Coopers & Lybrand as to merit review of the former pursuant to Supreme Court Rule 10.1.(c). All the petition contains is a passing reference to Coopers (Pet. 7), without any reasonable explanation as to exactly how it was that the Court of Appeals failed to heed this precedent. This fatal flaw in the petition is not surprising, because Coopers & Lybrand mandates the result reached by the Court of Appeals herein.

The insignificance of the first question presented for review is underscored by the First Circuit's decision not to publish its January 5, 1990 refusals to immediately entertain

interlocutory review. Pursuant to First Circuit Local Rules 36.1. and 36.2.(b)6., an unpublished opinion is "directed to the parties... and may not be cited in unrelated cases"; "may be cited only in related cases"; i.e., has no precedential value.

This isolated dispute over an arcane point of federal appellate jurisdiction hardly constitutes a matter of national importance which merits plenary review by this Court.

C. Petitioners' second "reason for granting the writ" is nothing more than an argument that the Court of Appeals somehow "erred" in refusing them a writ of prohibition (or now, "supervisory mandamus"). Pet. 13-17. This is insufficient to obtain review herein. Supreme Court Rule 10.1. Other than merely parsing the case law, Pet. 13-15, there is no showing as to how the Court of Appeals departed from the demanding standards established by this Court for the issuance of such extraordinary writs. Ex Parte Fahey, 332 U.S. 258, 91 L.Ed. 2041 (1947); Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. ___, 104 L.Ed.2d 318 (1989).

Petitioners' argument seems to be that the District Court somehow violated the XI Amendment by compensating for delay using compound interest calculations; and that this "error" by the District Court was of such extraordinary constitutional/ jurisdictional magnitude, that it compelled the Court of Appeals' intervention by writ of prohibition. Pet. 15-17.

Petitioners' argument borders on the frivolous. They had to demonstrate a "clear abuse of discretion," "conduct amounting

to usurpation of the judicial power," the absence of adequate alternative means for relief,[12] and that their right to issuance of the writ was "clear and indisputable." Mallard, 104 L.Ed.2d at 331.

In this case, petitioners faced two formidable barriers to any such showing of extraordinary circumstances, which showing the Court of Appeals understandably found was absent. Pet. Ap. 3a. First, there was controlling precedent from this Court to the effect that an enhancement to an attorneys' fee award to compensate for delay in payment does not violate the XI Amendment. Missouri v. Jenkins, 491 U.S. ___, 105 L.Ed.2d 229 (1989). Secondly, there was likewise controlling precedent from this Court, iterated in Jenkins, to the effect that compensation for delay may be computed "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 at 716, 97 L.Ed.2d 585 at 592 (1987) (emphasized); cited in Jenkins, 105 L.Ed.2d 229 at 239. Thus, it was clear under Jenkins that the XI Amendment presented no bar whatsoever to compensation for delay "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." Likewise, Library of Congress v. Shaw, 478 U.S. 310, 92 L.Ed.2d

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12. The Court of Appeals found that petitioners did "not even raise this issue [that irreparable injury would occur if immediate review were withheld] in their opposition to the motion to dismiss the appeal." Pet. Ap. 2a.

250 (1986), presented no such XI Amendment bar, petitioners' protestations to the contrary[13] notwithstanding. Jenkins, 105 L.Ed.2d 229 at 238-240.

Reduced to its essentials, then, petitioners' plaint is that the District Court somehow "erred" in selecting the "or" alternative, instead of the "either" alternative, both permitted by Jenkins: it adjusted the original fee based on historical rates to reflect its present value,[14] instead of awarding current rates.[15] The Court of Appeals then somehow "erred" when it heeded this Court's demanding standards by refusing to issue a writ of prohibition (now, "supervisory mandamus") to review actions taken by the District Court which were clearly authorized by Jenkins.

Under these circumstances, the Court of Appeals can hardly be faulted for its refusal to issue a writ of prohibition. Pet. Ap. 3a. Petitioners have not shown that there was a "clear abuse of discretion" or "conduct amounting to usurpation of the judicial power"; much less that they were "clearly and indis-

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13. Pet. 16.

14. By definition, "present value" calculations are based on compound, not simple interest. American Jurisprudence Proof of Facts, "Damages," Proof 22, pp. 652-654 (1959). In eminent domain, where the delay in payment exceeds a year, the federal government allows for compound interest as just compensation. 40 U.S.C.A. 258.e-1(2). See also 28 U.S.C. 1961(b) (interest on money judgments entered in civil cases in federal courts to be compounded annually).

15. It did award current (1988) rates, without any interest, for current (1987-1989) work. Pet. Ap. 8a.

putably " entitled to a writ of prohibition. These are hardly compelling reasons that meet the reviewability standards found in Supreme Court Rule 10.1.

As with the first "reason for granting the writ," petitioners' construction of an alleged "conflict" between the First and Ninth Circuits, the latter exemplified in Rosenfeld v. U.S., 859 F.2d 717 (9th Cir. 1988), Pet. 15, is contrived. The Rosenfeld court did not have a controlling precedent, like Jenkins, to guide it in its examination of the sovereign immunity defense raised by the United States, which the Rosenfeld court considered to "implicate the district court's scope of jurisdiction." 859 F.2d at 723. Thus, it exercised mandamus jurisdiction to review the defense, but eventually found no such valid defense and denied the writ. Id. at 727.

Here the First Circuit did exactly the same thing: deny the writ. Pet. Ap. 3a. It had no need to entertain, much less to settle, an alleged XI Amendment issue which this Court had already settled in Jenkins.

Petitioners' construction of an alleged "conflict" between the First Circuit in this case and the Ninth Circuit in Rosenfeld is based on a flawed premise: that XI Amendment immunity for state governments is coextensive with the "no-interest" bar which shields the federal government. This premise was expressly rejected in Jenkins precisely in the area of concern herein: attorneys' fees. Jenkins, 105 L.Ed.2d 229 at 238, n. 3.

D. In the final analysis, what petitioners seek is a ruling by this Court that interim fee awards (and their enhancement) qualify for the exceptional Cohen treatment and are therefore immediately appealable.

The final result sought by petitioners defies long-standing policy against piecemeal, interlocutory appeals. This firm policy is clearly set forth in a statute, 28 U.S.C. 1291: only final decisions are immediately appealable. The "policies militating against interlocutory appeals"[16] have long been recognized by this Court.

Furthermore, although the matter in controversy in this particular case consists of interim attorney's fees, what petitioners really advocate is a quite extraordinary relaxation of the Cohen requirements for all "cases of protracted institutional reform litigation where final judgment is not foreseeable." Pet. 6. Thus, it is petitioners who seek to "reformulate the collateral order doctrine," by making every interlocutory order, no matter how insignificant, immediately appealable in every "case of protracted institutional reform litigation where final judgment is not foreseeable." Taken to its final consequence, petitioners' theory would render immediately appealable, in such cases, even routine interlocutory orders entered as to the most picayune matters, e.g., orders granting or denying extensions of time.

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16. Scalia, J., concurring in Lauro Lines v. Chasser, 490 U.S. ___, 104 L.Ed. 2d 548 (1989).

In the appendix to a petition for certiorari in a prior phase of this litigation (petition no. 89-1016, pp. 63a-64a), petitioners referred to so-called protracted institutional reform litigation, pending in all but a handful of states, in the District of Columbia and in the U.S. Virgin Islands. Presumably, this should cover all of the federal courts of appeals, which sit over the federal trial courts where all of these cases are pending. Taking petitioners' theory to its logical consequence, all of the federal courts of appeals would now have to entertain appeals and exercise mandamus jurisdiction to review any and all interlocutory orders entered in each of these cases, no matter how inane, just because they were entered in cases belonging to that newly created and privileged classification, "protracted institutional reform litigation."

It must be noted that this artificial classification is sheer bootstrap, of petitioners' own making. For many years, petitioners have subjected respondents to cruel and unusual punishment. Feliciano v. Barceló, 497 F. Supp. 14, 16 (D.P.R. 1980). This had been going on well before the commencement of this case and continues to this day. Morales Feliciano v. Romero Barceló, 672 F. Supp. 591, 594 (D.P.R. 1986). To protract matters, petitioners have fought respondents "every step of the way frequently beyond the limits of responsible litigation... insisted on an adversary [posture] of extreme vexatiousness which has surely tested the patience of the [trial] Court and wasted judicial resources... litigate[d]

protractedly factual matters which petitioners know[s] to be true beyond any reasonable doubt... throughout the course of these proceedings." Id. at 595.

Petitioners have further protracted matters by agreeing to a stipulation to remedy overcrowding and then making an about-face and moving for relief from their own stipulation and from the order approving it. Morales Feliciano v. Hernández Colón, 672 F. Supp. 627 (D.P.R. 1987). Such tactics have been aptly described as "brinksmanship." Id. at 636.

Petitioners have protracted matters even further by their continued contempt for the orders of the trial court, which defiance has resulted in the imposition of civil fines. Morales Feliciano v. Hernández Colón, 697 F. Supp. 26, 36 (D.P.R. 1987). Petitioners have protracted matters still further by unsuccessfully pursuing the issue of fines all the way up to this Court. Morales Feliciano v. Parole Bd. of Com. of P.R., 887 F.2d 1 (1st Cir. 1989), cert. den. 108 L.Ed. 2d 646 (1990).

While the litigation has spanned over a decade, Morales Feliciano v. Hernández Colón, 697 F. Supp. 37, 38 (D.P.R. 1988), petitioners have protracted matters even further by their having "established a pattern of gratuitous, time-wasting contentiousness by [petitioners], who litigate in vain and obstruct the discovery of the truth of facts which are, and should be, beyond dispute.... The [trial] Court's attempts to mediate have been rebuffed and the [petitioners] have a poor record of cooperation

in disposing of the many problems generated even by stipulated decrees." Id. at 48.

In the meantime, respondents get beaten for talking to class counsel, Morales Feliciano v. Hernández Colón, 704 F. Supp. 16 (D.P.R. 1988); and one jail has been ordered closed. Morales Feliciano v. Hernández Colón, 697 F. Supp. 37, 51 (D.P.R. 1988).

In the specific area of attorneys' fees, petitioners have egregiously protracted matters by their litigation tactics:

> A brief summary of the fees' proceeding must be told. On prior occasions we have noted the contentiousness and the excessive adversariness with which defendants have met the claims made by the plaintiff class.... This incident is no exception to the stonewalling, dilatory tactics used by the defendants. They have made every attempt to make sure that "[t]his fee litigation [would result] in what the Court in Hensley warned against; "a second major litigation."...
>
> Not unexpectedly, the showing made by defendants at the hearing was weak. Broad-gauged attacks on duplication of work or challenges to the claims made by plaintiffs' attorneys followed the same pattern of litigation that has characterized this case. The fact that an immense amount of work had been performed for the plaintiff by first-rate lawyers could not be contested. We had anticipated attacks on particularized claims to match the requests for information and for time to prepare for this hearing. The defendants never went beyond vagueness and protestation....
>
> Finally, we believe that the claimed hours are more than reasonable in light of defendants' contentiousness and lack of compliance with this Court's orders. It must be stressed that the prison conditions were declared unconstitutional more than eight years ago. Plaintiffs' attorneys are still litigating this case because of defendants' irresponsibility. And, as we have held before,... defendants' conduct throughout the whole litigation has been, to put it

> mildly, obstreperous. They have opposed, sometimes viciously, every discovery attempt or motion by plaintiffs.[5] "The government cannot litigate tenaciously [in this case, excessively] and then be heard to complain about the time necessarily spent by plaintiffs in response."...
>
> 5. The latest example was the Secretary of Justice's complete disobeyance of this Court's July 13, 1986, order to produce documents in relation to the attorneys' fees issue. We could have held him in contempt but reluctantly refrained from doing so because that would have further delayed the attorney's fees award.

Morales Feliciano v. Hernández Colón, 697 F. Supp. 51, 55-56, 57 (D.P.R. 1988).

If the litigation has been "protracted," then it is only due to petitioners' failure to abide by the Bill of Rights and by their reprehensible litigation tactics, which tactics have caused all sorts of delay; in short, due to petitioners' inexcusable conduct. This has transmogrified the case into "protracted institutional reform litigation" and, according to petitioners, now entitles them to the immediate attention of the Court of Appeals on any and every interlocutory matter which may arise in the case.

This petition for certiorari is but another example of petitioners' tactical maneuvers to further protract this case.[17] While petitioners enjoyed the representation of retained counsel over the years, which counsel get paid on a regular basis, the payment of fees to respondents' counsel was delayed, in the hope

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17. It is petitioners who have defied this Court's admonitions. Hensley v. Eckerhart, 461 U.S. 424 at 437, 76 L.Ed. 2d 40 at 53 (1983).

that sheer economic power would eventually obstruct any vindication of the constitutional rights of the prevailing parties, the respondent class.

Respondents submit that this case is not an extraordinary case where still another Cohen exception can or should be excised; thus, it is not worthy of review by this Court. Stated otherwise, it is not necessary to grant review herein for the sole purpose of adhering to a policy and then to affirm.

E. Once again, the final result sought by petitioners is to obtain the immediate reviewability of each interim fee award (and any enhancement thereof) in an ongoing civil rights case such as this one.

In this particular case, there have been two interim fee awards and an enhancement of the first one. There should be other interim fee awards in the future. As petitioners would have it, each interim fee award would be immediately followed by a separate round of appeals, eventually culminating in this Court. Predictably, this case should then come before the Court of Appeals and this Court, periodically, on the sole issue of the propriety vel non of each interim fee award, until final compliance be achieved, if ever. At least one separate slot in this Court's docket should then be "reserved" for review of interim fee awards made in this case, from time to time.

The result would be not just one, but a whole series of "secondary fee litigation(s)," until final judgment. This Court has stated that a request for attorney's fees should not turn

into extensive, protracted satellite litigation. Hensley v. Eckerhart, 461 U.S. 424 at 437, 76 L.Ed. 2d 40 at 53 (1983).

This case is an example of such an undesirable series of "secondary fee litigations." The 1988 and 1989 interim fee awards and the 1989 enhancement have now been the object of no less than two separate rounds of appeals, totalling four appeals to the Court of Appeals,[18] a petition for writ of prohibition, and now this petition for certiorari. Assuming, as we must, other interim fee awards, given petitioners' pugnaciousness,[19] there would be further appeals to the Court of Appeals, further petitions for writs of prohibition and further petitions for certiorari to this Court. The rounds of "secondary fee litigations" would grow exponentially, this time into the appellate levels.

This would do violence to the policy described in Hensley against protracted, satellite fee litigation. It is not necessary to grant review herein just to iterate the Hensley policy and then affirm because the result sought by petitioners violates that policy.

IV. Conclusion

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18. Respondents admit responsibility for part of the first round of appeals.

19. As noted by the District Court, 697 F. Supp. 51 at 55-56; Pet. Ap. 30a-31a.

Petitioners having failed to present a case worthy of review by this Court, their petition for a writ of certiorari should be denied.

Respectfully submitted on July 5, 1990.

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No. 89-1904

SUPREME COURT OF THE UNITED STATES

October Term, 1989

Rafael Hernández Colón, et al.,

Petitioners,

v.

Carlos Morales Feliciano, et al.,

Respondents.

On Petition For A Writ of Certiorari To The
United States Court of Appeals For The First Circuit

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CARLOS MORALES FELICIANO, et al.,	*	
Plaintiffs	*	CIVIL NO. 79-4 (PG)
v.	*	
RAFAEL HERNANDEZ COLON, et al.,	*	
Defendants	*	
	*	

MOTION DEPOSITING MONIES

TO THE HONORABLE COURT:

COME NOW defendants Governor Rafael Hernández Colón, Administrator of Corrections Mercedes Otero de Ramos, and the current members of the Parole Board of the Commonwealth of Puerto Rico, by their undersigned attorneys, and respectfully state:

1. Pursuant to this Court's Order of September 13, 1989, defendants hereby deposit with the Clerk of the Court check no. 00577241, issued on February 28, 1990 by the Department of the Treasury of the Commonwealth of Puerto Rico, to the Clerk of the U.S. District Court, in the amount of $2,500,859.00. Said amount represents the additional amount of

interim attorney fees plus interest awarded to the six petitioners.[1]

2. The September 13, 1989 Order amends the September 20, 1988 Order to award petitioners the following additional amounts.[2]

	Total Award	Amount[3] Already Paid	Outstanding
Nachman	1,412,976.24[4]	433,748.25	979,227.99
Pérez-Bachs	166,647.48	45,805.50	120,841.98
Anduze	368,781.49	109,456.75	259,324.74
Fdz. Seín	966,846.23	296,596.95	670,249.28
Ramos	106,153.86	49,290.00	56,863.86
	3,021,405.30	934,897.45	2,086,507.85

3. The September 13, 1989 Order also awards the following amounts for services rendered between December 1, 1987 and July 31, 1989:

Nachman	96,473.00
Pérez-Bachs	57,318.30
Anduze	57,324.80
Fdz. Seín	68,390.40
Ramos	29,640.00
Díaz de Carreras	15,080.00
TOTAL	324,226.50

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[1]Defendants have already deposited interim attorneys fees plus interest in the amounts of $934,897.45 and $70,111.67.

[2]For services rendered up to December 1, 1987.

[3]See Motion Depositing Monies of August 15, 1989.

[4]While the face of the Order, on p.3, awards $1,413,345.31; Appendix A correctly establishes the amount to be $1,412,976.24.

4. Thus, as a result of the September 13, 1989 Order, petitioners are entitled to the following additional amounts:

Nachman	979,227.99 +	96,473.00 =	1,075,700.99
Pérez-Bachs	120,841.98 +	57,318.30 =	178,160.28
Anduze	259,324.74 +	57,324.80 =	316,649.54
Fdz. Seín	670,249.28 +	68,390.40 =	738,639.68
Ramos	56,863.86 +	29,640.00 =	86,503.86
Díaz de Carreras		15,080.00 =	15,080.00
TOTAL	2,086,507.85	324,226.50	2,410,734.35

5. In addition, post judgment interest has been calculated at the annual rate of 8.27% for the period comprised between September 13, 1989, when the Judgment was entered, and on or about February 28, 1990, when the enclosed check was prepared as follows:

	Principal Amount		Post Judgment Interest		Total
Nachman	1,075,700.99	+	40,225.69	=	1,115,926.68
Pérez-Bachs	178,160.28	+	6,662.21	=	184,822.49
Anduze	316,649.54	+	11,836.92	=	328,486.46
Fdz. Seín	738,639.68	+	27,613.46	=	766,253.14
Ramos	86,503.86	+	3,227.43	=	89,731.29
Díaz de Carreras	15,080.00	+	558.94	=	15,638.94
TOTAL	2,410,734.35		90,124.65		2,500,859.00

6. The deposit of these monies with the district court for withdrawal by petitioners pursuant to this Court Order of September 13, 1989 is not be construed as a waiver of the right of defendants and/or the Commonwealth of Puerto Rico to seek judicial review of said order at the appropriate time and, should said order be vacated in full or partially, to seek the refund of monies unwarrantedly paid out. See Morales

Feliciano v. Hernández Colón, Memorandum opinions, (1st Cir., May 10, 1989 and January 5, 1990).

WHEREFORE, it is respectfully requested from this Honorable Court to take note of the above and permit the foregoing petitioners to make the corresponding withdrawals as described in paragraph 5 of this motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 6th day of March 1990.

I HEREBY CERTIFY that on this date copy of this document was mailed to Rafael Pérez-Bachs, Esq., G.P.O. Box 4225, San Juan, Puerto Rico 00936; Harry Anduze Montaño, Esq., 117 Eleanor Roosevelt Ave.. Suite 303, Hato Rey, Puerto Rico 00918; Harvey B. Nachman, Esq., P.O. Box 9949, Santurce, Puerto Rico 00908; Pedro A. Del Valle Ferrer, Esq., Puerto Rico Department of Justice, P.O. Box 192, San Juan, Puerto Rico 00902; Nora Rodríguez Matías, Esq., Condominio El Centro I, Oficina 215, Hato Rey, Puerto Rico 00918; Ivonne Díaz de Carreras, Esq., Midtown Building, Suite 206, 421 Muñoz Rivera Ave., Hato Rey, Puerto Rico 00919; Carlos Ramos González, Esq., Inter American University Law School, Box 8897, Fernández Juncos Station, Santurce, Puerto Rico 00910; José Fernández Paoli, Esq., Suite 407, Centro de Seguros Bldg., 701 Ponce de León Ave., Miramar, Santurce, Puerto Rico 00907; Vincent M. Nathan, Esq., 644 Spitzer Bldg., 520 Madison Avenue, Toledo, Ohio 43604; Louis Siegel, Esq. Office of the Court Monitor, P.O. Box 5918 Old San Juan Station, San Juan, Puerto Rico 00902;

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